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# Supreme Court of the United States.

ISABELLA F. BLACKSTONE, individually, and as executrix of the last will and testament of Timothy B. Blackstone, deceased,

Plaintiff in error,

AGAINST

NATHAN F. MILLER, Comptroller of the State of New York, and EDWARD M. GROUT, Comptroller of the City of New York.

October Term, 1902.

No. 423.

*Error to the Surrogates' Court of the County and State of New York.*

## BRIEF FOR THE PLAINTIFF IN ERROR.

EDWARD W. SHELDON,
*Counsel for plaintiff in error.*

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### STATEMENT.

This is a writ of error to the Surrogates' Court of the County of New York, filed August 19, 1902, to review the proceedings in that Court, in the Appellate Division of the Supreme Court of the State of New York and in

the Court of Appeals of that State, to levy a transfer or succession tax of $77,536.09 under the laws of the State of New York upon certain indebtedness of a New York trust company and a firm of private bankers of the City of New York, to Timothy B. Blackstone, the testator above named, a resident of the State of Illinois.

This proceeding was taken under Article X of the Tax Law of the State of New York, and a copy of the article is attached as an appendix to this brief.

The proofs presented show the following undisputed facts:

Mr. Blackstone, who for many years prior to his death was domiciled in the city of Chicago, died there May 26, 1900, at the age of seventy years (Record, fol. 15). He left a will which was proved before the Probate Court of Cook County, Illinois, July 17, 1900, and letters testamentary upon which were issued to Isabella F. Blackstone, his widow, the plaintiff in error here (fol. 17). By the terms of this will he made legacies aggregating $800,000 to collateral relatives, strangers, and Illinois and Connecticut charitable organizations; the residue of his estate, real and personal, he gave to his wife absolutely (fols. 22–25). These legatees, no one of whom resided in New York, have been paid in full by the plaintiff in error and, with one exception, without deduction for succession taxes, Federal or State (fols. 18–19). Mr. Blackstone's estate consisted of real property in the city of Chicago appraised at $236,793; miscellaneous stocks, bonds and other personal property in that city at the time of his

death, $250,454.86; $4,843,456.72 due him on a deposit account with the United States Trust Company of New York, and $10,692.24 due him on a like account with the firm of Cuyler, Morgan & Co., bankers, of the City of New York, and transfer agents of the Chicago and Alton Railroad Company, an Illinois corporation (fols. 48–50, 17–18).

The origin of this deposit with the trust company, which presents the main question sought to be reviewed here, was as follows: For 34 years before his death Mr. Blackstone was president of the Chicago and Alton Railroad Company. In March, 1899, in pursuance of an offer to the stockholders of that company to purchase its common stock at $175 a share, and its preferred stock at $200 a share, the control of the company was acquired by a syndicate of capitalists. Mr. Blackstone thereupon resigned his presidency and followed the other stockholders in selling his stock to the syndicate. At the price offered, the amount due him for his own 15,077 shares of common stock and 11,450 shares of preferred stock, was $4,881,522.21 (fols. 15–16). In addition he held as trustee under the will of Henry B. Norton, a citizen of Connecticut, certain additional shares of the same stock, aggregating $299,527.06 in value (fols. 15–16). The trust company had been selected by the syndicate as the depositary of stock purchased, and was authorized, upon receiving the certificates of stock, to pay the agreed price therefor. When Mr. Blackstone had determined to sell his stock he wrote the trust company asking whether in case of

such sale he might leave the proceeds with the trust company; that he was at a loss to know how safely to invest these proceeds, and might wish to deposit a considerable sum for several months. The trust company answered that it would receive such proceeds, hold them subject to his order, and allow interest thereon at the rate of two per cent. per annum, subject to reduction in the rate at any time upon notice, but that if he required more than $100,000 at any time, he should not draw upon the trust company without at least two days' notice. A few days later Mr. Blackstone sent his certificates of stock from Chicago to the trust company, and asked that the proceeds of sale thereof be credited in account with himself to be held as a deposit upon the trust company's usual terms as to interest and withdrawal of the same (fols. 87–91). Upon receipt of the stock certificates the company on March 31, 1899, made a book transfer from its account with the Chicago and Alton purchasing syndicate to a new account in his name in its ledger entitled "Deposits in Trust," of the sum of $4,881,522.21. No certificate of deposit nor pass book was issued, and the only evidence of the deposit was this book entry and the correspondence above mentioned (fols. 85–86). The rate of interest allowed by the trust company was of its own motion raised to two and one-half per cent. (fol. 91). Its usual terms of deposit were that all payments thereof were to be made in current funds, and that five days' notice of withdrawal must be given by the depositor (fol. 86). Between March 31, 1899,

and his death Mr. Blackstone withdrew and invested $192,989.11 of this sum, so that after crediting to the account the interest which accrued thereon to the date of his death, the balance above mentioned of $4,843,456.72 was found (fols. 17, 92). In the case of the $299,527.06 held by him as trustee of the Norton estate, he effected such withdrawal and reinvestment prior to August 10, 1899 (fol. 94). His fixed intention was to leave his personal balance with the trust company only temporarily and pending its investment (fols. 16, 94). Owing to his ill-health, which was continuous and progressive from the date of the deposit until his death, he was able to carry out this intention only in small part (fol. 95). On several occasions he expressed disappointment at this failure, and said that it was causing him great pecuniary loss (fol. 94).

The business done by the trust company is not like that of a bank of deposit. It does not receive, pay out or hold actual money; nor is it by law required to maintain a lawful money reserve (fol. 86). Deposits made with it take the form of checks, drafts and other orders for the payment of money, and are in turn endorsed by it for deposit with one of its regular banks of deposit. Payments made by the trust company to its depositors are not made in money but in checks drawn by it upon one of those banks. In view of this method of conducting its business, the company is in the habit of keeping all but a small portion of its deposits invested in government bonds,

loans on collateral, New York City bonds, corporate bonds and stocks, bonds and mortgages, and other securities, and on the day of Mr. Blackstone's death, May 26, 1900, the aggregate amount to the company's credit in its banks of deposit did not exceed $3,800,000 (fol. 86).

Shortly after the will was admitted to probate, proceedings were taken in the County Court of Cook County, Illinois, under the Illinois Inheritance Tax Law (act of June 15, 1895) to fix the tax due from Mr. Blackstone's estate. These proceedings terminated in a final order appraising his total estate, including the New York credits, at $5,341,396.82, and fixing the tax thereon at $64,625.56 (fols. 71–83), and this sum was on November 26, 1900, and before any notice of the New York proceeding was given (fol. 5), paid by the plaintiff in error to the treasurer of Cook County. This tax was computed at the rate of one per cent. upon the residuary gift to the widow, and at rates varying from two to six per cent. upon the $800,000 of general legacies (fols. 80–83).

The executrix also paid a legacy tax of $21,095 to the United States Government under the War Revenue Act of 1898, and other administration expenses and debts amounting to $331,706.81 (fols. 93–4).

No probate nor administration proceedings have been had in New York (fol. 18). The testator never lived nor did business in that state (fol. 15) and left no debts there (fol. 16).

In November, 1900, application was made by the Comptroller of the City of New York to the Surro-

gates' Court for New York County to appoint an appraiser under the New York Transfer Tax Law (fol. 1). Notice of the appraisement was sent by mail to Mrs. Blackstone December 3, 1900 (fol. 5). She appeared by attorney for the purpose of contesting the jurisdiction of the Court, and in her notice of appearance as well as in her answering affidavit specifically raised various constitutional and other objections to the imposition of any tax (fols. 6–8, 19–20).

By his report filed February 19, 1901, the New York appraiser found the net value of the property subject to tax in this proceeding to be $4,553,609.58, consisting of $800,000 of general legacies taxable at five per cent., and a residue of $3,753,609.58 taxable at one per cent. (fols. 9–14). This net value was reached by deducting from the amount of the New York deposits, the proportion of the debts and administration expenses, excluding the Illinois inheritance tax and the Federal legacy tax, which the amount of the New York deposits bore to the entire estate of the testator. Upon the filing of this report an order as of course was in accordance with the procedure prescribed by the Tax Law, forthwith and without hearing entered February 20, 1901, which fixed a tax of $77,536.09 upon the New York deposits (fols. 97–98). From this order, as well as from the appraiser's report, Mrs. Blackstone appealed to the Surrogates. Notice of appeal was filed in the Surrogates' office February 25, 1901, and stated the following grounds of appeal:

"FIRST. That at the time of his death Timothy B. Blackstone, the decedent above named, was not a resident of the State of New York, and left no property in said State.

"SECOND. That the will of said decedent, by which the transfer attempted to be taxed in this proceeding was made, was duly proved before the Probate Court of Cook County, in the State of Illinois, where said decedent resided at the time of his death; that letters testamentary thereon were duly issued by said Court to this appellant, and that no proceedings for the probate of said will or the administration of said decedent's estate have been taken in the State of New York.

"THIRD. That the appellant herein, and all the other legatees named in said order, were at the time of said decedent's death, and are, residents and citizens of the United States, but non-residents of the State of New York.

"FOURTH. That if the debts due said decedent at the time of his death from the United States Trust Company of New York, and the firm of Cuyler, Morgan & Company of the City of New York, which constitute the only property appraised herein, can be deemed for any purpose property then situated within the State of New York, that such property was only transitorily within said State.

"FIFTH. That a tax upon the transfer of and succession to all of the property of said decedent upon his death, including said debts so due him from said Trust Company and firm, has been duly assessed by the County Court of Cook County, in the State of Illinois, to which jurisdiction in that behalf belonged, and paid by this appellant to the Treasurer of said Cook County.

"SIXTH. That this Court has no jurisdiction in the premises, and that this proceeding and

said appraisement, assessment, determination, report and order are void.

"SEVENTH. That the Transfer Tax Law of the State of New York was not intended to and did not in fact include in its operation any debts owing to the decedent at the time of his death by said Trust Company or firm.

"EIGHTH. That if said law had such intention or effect, said law was to that extent, and each and every part of said appraisement, assessment, determination, report and order was unconstitutional and void, for the following reasons:

1. That they impair the obligation of the contracts made by said decedent with said Trust Company and firm, respectively, and so violate Section 10 of Article I of the Constitution of the United States.

2. That they deny full faith and credit in the State of New York to the public acts, records and judicial proceedings of the State of Illinois, and so violate Section 1 of Article IV of said Constitution.

3. That they deprive citizens of Illinois and Connecticut of certain privileges and immunities of citizens of the State of New York, and so violate Section 3 of Article IV of said Constitution.

4. That they abridge the privileges and immunities of this appellant and the other legatees under the will of said decedent, and would deprive this appellant and said other legatees of their property without due process of law, and deny to them the equal protection of the law, and so violate Article XIV of amendment to said Constitution.

5. That they would deprive this appellant and said other legatees of their property without due process of law, and so violate Section 6 of Article I of the Constitution of the State of New York.

"NINTH. That said report and order erroneously fix the value of the property of said decedent passing by his will at $4,553,609.58, without deducting the sum of $64,625.56, which was paid by this appellant to the County Treasurer of Cook County, Illinois, on the 26th day of November, 1900, as the inheritance tax levied and assessed upon the right of succession of the legatees under said will to all the property of the decedent, including the amounts owed him at the time of his death by said Trust Company and firm; and also without deducting the sum of $21,095 paid by this appellant as the Federal legacy tax assessed upon the $800,000 of general legacies given by said will" (fols. 103–106).

Surrogate Fitzgerald, before whom the appeal was argued, reversed the order of February 20, 1901, and entered a final order July 26, 1901, declaring the entire estate of the testator exempt from the New York transfer tax (fols. 107–109). The opinion of the Surrogate is printed at folios 112–114, and is reported in 35 Misc. Rep. 585 (N. Y.). From this order an appeal was attempted to be taken by the Comptroller of the City of New York on August 12, 1901, to the Appellate Division of the Supreme Court in the First Department (fol. 110). Before Surrogate Fitzgerald rendered his decision, chapter 173 of the laws of 1901, taking effect April 1, 1901, terminated the connection of the Comptroller of the City of New York with transfer tax proceedings, and devolved all of his duties and rights in that regard upon the Comptroller of the State of New York. Mrs. Blackstone, individually and as

executrix, therefore duly moved to dismiss this appeal upon the ground that the Comptroller of the City of New York was neither interested in nor aggrieved by the order appealed from (fols. 127–8). The motion was denied by the Appellate Division on the ground that "The Comptroller of the City of New York having properly instituted these proceedings they must necessarily be conducted in his name (notwithstanding that his powers and duties in relation thereto have devolved by law upon the Comptroller of the State of New York), until substitution of parties has been made" (fol. 146).

Mrs. Blackstone then moved for leave to appeal to the Court of Appeals from the order denying her motion to dismiss the appeal, and that the Appellate Division certify that a question of law had arisen regarding the right of the Comptroller of the City of New York to take such appeal, which, in the opinion of the Appellate Division, should be reviewed by the Court of Appeals (fols. 139–140). This motion also was denied (fols. 143–144).

Having denied both these motions, the Appellate Division subsequently reversed Surrogate Fitzgerald's order upon the ground that the *Matter of Houdayer*, 150 N. Y. 37, was controlling authority as to the taxability of the Blackstone deposits. The opinion of the Appellate Division, which also cites in its support *Matter of Romaine*, 127 N. Y. 80; *Matter of Whiting*, 150 N. Y. 27, and *Matter of Bronson*, 150 N. Y. 1, is printed at folios 122 to 125, and is reported in 69 App. Div. 127 (N. Y.)

Mrs. Blackstone, individually and as executrix of her husband's will, thereupon appealed to the Court of Appeals of the State of New York, and stated in her notice of appeal that she intended to bring up for review the two previous orders of the Appellate Division, one denying her motion to dismiss the appeal of the Comptroller of the City of New York to the Appellate Division, and the other denying her motion to appeal to the Court of Appeals from such order of January 29, 1902 (fols. 119, 120).

The Court of Appeals denied the motion to dismiss the appeal of the Comptroller of the City of New York to the Appellate Division, and affirmed the final order of the Appellate Division which reversed Surrogate Fitzgerald's decision. The only opinion or reason assigned by the Court of Appeals for this affirmance was as follows (fol. 174): "Order affirmed, with costs, on the ground that this case is controlled by the *Matter of Houdayer* (150 N. Y. 37)." O'Brien, J., dissented (171 N. Y. 682.) The remittitur and record having thereupon been sent back to the Surrogates' Court, a formal order was entered in that court June 30, 1902, making the order of the Court of Appeals the order of the Surrogates' Court (fols. 151–152).

Mrs. Blackstone then sued out a writ of error to this Court.

## Specification of Errors.

First. That the property involved in this proceeding consists of debts due by residents of New York to a

decedent who resided in Illinois; that such debts were not within the state of New York when the decedent died; that his will has been proved and all of his legatees reside without that state, and that accordingly the courts of New York have no jurisdiction to assess a tax upon such debts, or upon the succession thereto.

SECOND. That if such debts could upon any theory be regarded as property within the state of New York, they were only transitorily there, and could not under the Federal constitution or otherwise be taxed there.

THIRD. That the taxation of such debts in this proceeding impairs the obligations of the contracts out of which such debts arose, and is therefore unconstitutional.

FOURTH. That such debts have already been adjudged to be liable to a succession tax in the state of Illinois, and their subsequent taxation in the state of New York is unconstitutional: (1) because it is double taxation, and (2) because it denies full faith and credit to the public acts, records and judicial proceedings of the state of Illinois.

FIFTH. That the taxation of such debts in New York is unconstitutional because it deprives the executrix of and legatees under said will, who are citizens of other states, of certain privileges and immunities of citizens of the state of New York.

SIXTH. That such taxation is unconstitutional both in method and result, in that it abridges the privileges and immunities of such executrix and legatees, deprives

them of their property without due process of law, and denies to them the equal protection of the law.

SEVENTH. That the courts below should have dismissed the proceeding to impose a transfer tax upon the property in question.

## BASIS OF THE JURISDICTION OF THIS COURT.

The constitutional objections recited in the foregoing assignment of errors were taken on the threshold of the proceeding and thereafter were successively urged upon the courts below, both in the briefs and in the oral arguments. While sustained in part at least by the Surrogate, they have been disregarded by the Appellate Division and the Court of Appeals. The fact that the objections were not expressly considered in the opinions of those courts, is not material (*Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, 231). Both courts founded their conclusion upon the theory that this case was controlled by the *Matter of Houdayer*, 150 N. Y. 37. Reference to the Houdayer case will show that the points raised by the State Tax on Foreign Held Bonds case, 15 Wall. 300, were considered (3 App. Div. 476). But irrespective of that fact, as the record shows that the unconstitutionality of the law had been repeatedly called to the attention of the courts below, it follows that the judgment appealed from "necessarily denied the federal rights thus specially set up; for that judgment could

not have been rendered without deciding adversely to such claims of right" (166 U. S. 231).

The ultimate determination of the constitutionality of the proceedings below thus rests upon this Court.

*Scott* v. *McNeal*, 154 U. S. 34, 45.

## Summary of the Argument.

I. The debts in question had no taxable *situs* within the State of New York.

1. The established principles of taxation prohibit the taxation of intangible property owned by non-residents.

2. These principles have been embodied in the New York statutory scheme.

3. The same principles apply to succession taxes.

4. The few decisions where money in bank has been subjected to a succession tax are distinguishable from the present case, because:

(*a*) The deposit here was substantially different, both in fact and law.

(*b*) The Blackstone succession had already been adjudged to be taxable in Illinois.

(*c*) The constitutional considerations involved in the present case had not been finally determined.

II. If the indebtedness of the trust company could,

upon any theory, be regarded as property within the State of New York, it was not taxable in that State, because it was only transitorily there.

III. A construction of the statute which permits double taxation should be avoided.

IV. As succession, inheritance and transfer taxes in the United States are levied upon the power to transmit the title to property and not upon the property itself, the State of New York was without jurisdiction to tax the exercise of a power which it did not create and could not take away.

V. Where any doubt exists as to liability to a succession tax, the doubt should be resolved in favor of the person sought to be taxed.

VI. The taxation in this proceeding of unsecured, intangible debts due Mr. Blackstone from residents of New York would violate the Federal Constitution, because:

1. It would impair the obligation of the contracts of deposit.

2. It would deny full faith and credit to the public acts and judicial proceedings of the State of Illinois.

3. It would curtail in New York privileges and immunities of citizens of Illinois.

4. It would abridge the privileges and immunities of the legatees, would deprive them of their property without due process of law, and would deny them the equal protection of the laws.

VII. The courts below had no jurisdiction to assess

a transfer tax, and Surrogate Fitzgerald's decision to that effect was right, and should be sustained and reinstated.

## POINT I.

### THE DEBTS IN QUESTION HAD NO TAXABLE SITUS WITHIN THE STATE OF NEW YORK.

It should be remarked at the outset that it does not appear upon what theory the $10,692.24 due Mr. Blackstone by the firm of Cuyler, Morgan & Company was treated as assessable in New York. It is probable that, owing to the much greater size of the debt due from the trust company, the appellate courts below overlooked the distinction between the two debts. However that may have been, it is clear that the account with the firm was not controlled by the reasoning advanced by those courts.

#### STATUS OF THE TRUST COMPANY DEBT.

What was appraised for taxation in this proceeding was nothing more than two debts due from solvent citizens of New York to a citizen of Illinois. In describing these debts as "deposits" we speak figuratively. They were intangible, inidentifiable and incapable of physical *situs*. They were not subject to levy and sale under an execution in New York, nor could they have been replevied there. In order to collect or transfer them it was not necessary to take out letters testamentary or of administration in that state (*Toronto*

*General Trust Company* v. *Chicago, Burlington and Quincy Railroad Company*, 123 N. Y. 37, 47.) In its inception the debt due by the United States Trust Company was merely a credit transferred from the Chicago and Alton syndicate to Mr. Blackstone, and became part of the debtor's intangible resources, and was used for its profit. The proof in this case shows precisely what deposits with the trust company mean. No money passes; the trust company holds no money, pays out no money; it is not a bank; it is itself a depositor with its regular banks of deposit. When it wishes to pay the amount due one of its depositors it does so by giving him a check on one of these banks. The amount due Mr. Blackstone was not payable on demand, for the trust company was entitled to a notice of five days before any portion of the deposit was paid (fol. 86), or at least was entitled to a notice of two days before a larger sum than $100,000 could be demanded (fol. 88). Not only is this true, but the further significant fact appears that, on May 26, 1900, the date of Mr. Blackstone's death, when the taxable transfer, if any, took place, the trust company had not to its credit in any banks balances in excess of $3,800,000, although it owed to Mr. Blackstone alone $4,843,000 (fol. 86). The company's business is that prescribed by its charter, namely, receiving moneys in trust, accumulating them at an agreed rate of interest, executing any trusts committed to it by persons, corporations or courts, acting as trustee of corporate mortgages, acting as fiscal or transfer agent for corporations, purchasing or selling stock,

bonds and other securities, and acting as executor, administrator, committee, guardian or receiver (chapter 433, laws of 1892).

No certificate of deposit nor pass book was issued to Mr. Blackstone. The amount due him was entered in the company's general ledger entitled "Deposits in Trust," and this book, together with the correspondence between the parties which is in the record (fols. 88–91), supplied the only evidence of the contract between them (fol. 86). The indebtedness immediately became the property of the debtor and was used and protected by the laws of New York for the benefit of the debtor, not of the creditor. For the benefit of that protection the debtor was already taxed. If the amount of the deposit had been lost or stolen, the debtor and not the depositor would have been the sufferer.

"It is commonly said," to quote from the second edition of Judge Cooley's work on Taxation, at page 19, "that taxation and protection are reciprocal; and this, if rightly understood, is correct, though some subjects receive the protection of government which are not taxable, and some may be taxed though not protected." And if this limitation exists where the protection is primary, as in the case of certain resident owners, it does not seem unreasonable if the indirect interest of a non-resident creditor in the solvency of his debtor is exempted from a tax burden.

Even in the case of a bank its relation to a depositor is, of course, that of debtor and creditor (*Shipman* v. *Bank of the State of New York*, 126 N. Y. 318, 327; *U. S.* v.

*Wardell*, 172 U. S. 48, 55; *Clason* v. *City*, 46 La. Ann. 1, 5).

In the last cited case, the Supreme Court of Louisiana in exempting from current taxation a New Orleans' bank deposit belonging to a non-resident firm, used this language:

> "Under the principles enumerated in those cases the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office, and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein we have to deal with the plaintiffs as *non-residents*, and *in so dealing with them* we are of the opinion that the judgment of the lower court is correct. We can not distinguish between the debt due to the plaintiffs by a bank as arising from a deposit to the credit of the firm in money and that due to it from any other cause.
>
> "The relations between the plaintiff and defendant are those of creditor and debtor. The moneys were not specially deposited and to be identically restored. They went into the mass of the bank's money with the understanding that they might be used and should be the basis of items in a debit and credit account. *Sims* v. *Bean*, 10 An. 347; *Mathews, Finley & Co.* v. *Their Creditors*, 10 An. 344."
>
> *Clason & Co.* v. *City*, 46 La. Ann. 1, 4, 5.

This case was qualified in *Bluefield Banana Company* v. *Board of Assessors*, 49 La. Ann. 43, but not, as we believe, in such a way as to affect the present discussion. See *New Orleans* v. *Stempel*, 175 U. S. 309, 314; *Liverpool and London and Globe Insurance Company* v. *Board of Assessors*, 51 La. Ann. 1028; *Comp-*

*toir National D'Escompte de Paris* v. *Board of Assessors*, 52 La. Ann. 1319, 1329.

It has, however, sometimes been held that for the purposes of taxation money in bank may be treated as cash; but the trust company does not do the business of an ordinary bank. That is not the function of such corporations in New York. As was said by the Court of Appeals of a trust company's status: "Its relations with a depositor are obviously those of a debtor and creditor. The moneys belong to the company when deposited, and through their use in the permitted ways, are gained moneys with which to make the interest payments accrued" (*People* v. *Binghampton Trust Co.*, 139 N. Y. 185, 189). A bank has been defined by Worcester as "An establishment for the custody and issue of money," and the manifest and material distinctions between those functions and the corporate powers of the trust company will appear from an examination of the charter of the company, a copy of which is attached as an appendix to this brief. In fact the company was specifically held not to be a banking institution in *United States Trust Company* v. *Brady* (20 Barb. 119), and this view has since received the highest support. Thus the Court of Appeals has said in a recent case: "It is very obvious that trust companies are not in the legal or commercial sense engaged in the business of banking" (*Jenkins* v. *Neff*, 163 N. Y. 320, 330), and this Court has on two occasions used similarly emphatic language. "Trust companies, however, in New York, according to the powers conferred

upon them by their charters, and habitually exercised, are not in any proper sense of the word banking institutions" (*Mercantile National Bank* v. *New York*, 121 U. S. 138, 159; *Jenkins* v. *Neff*, 186 U. S. 230, 234).

I. THE ESTABLISHED PRINCIPLES OF TAXATION PROHIBIT THE TAXATION OF INTANGIBLE PROPERTY OWNED BY NON-RESIDENTS.

We shall now consider the proposition stated at the beginning of this point in the light of general principles of taxation. The following authorities will, we think, sustain our contention:

1. *Decisions of the Federal Courts.*

"All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

Marshall, C. J., *M'Cullough* v. *Maryland*, 4 Wheat, 316, 429.

"Nor shall we enquire into the competency of the legislature of Pennsylvania to impose this tax, upon general principles, as we shall place the objection upon other and distinct grounds, though we must say, that the tax upon the promissory note or bond, given by the resident debtor, and the withholding of the amount from the interest due to the non-resident holder, would seem to be a tax upon such non-resident. It is not a tax of the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident holder. * * *

"Our conclusion on this branch of the case is, that to permit the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."

Nelson, J., *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267, 268.

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

Field, J., *State Tax on Foreign Held Bonds Case*, 15 Wall. 300, 319.

In *Savings Society* v. *Multnomah Co.*, 169 U. S. 421, the Court modified some of the language last quoted so far as it applied to the intangible quality of a real estate mortgage, and held that such a mortgage belonging to a non-resident, *but not the bond*, might be taxed in the state where the mortgaged land was situated.

But that the general effect of the earlier decision was not limited, will appear from the following language of Gray, J.:

> "Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage, and is considered as indebtedness within the State for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the State is deducted." * * *
>
> The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs*." 169 U. S., 425, 427–8.

So in *New Orleans* v. *Stempel*, *supra*, the Court held that money, municipal bonds and bonds secured by mortgages on New Orleans real estate, which were owned by a resident of New York, but were permanently held and managed by an agent in New

Orleans, were subject to taxation in the latter city. In the course of its opinion the Court quoted at page 320 the following sentence from *State Tax on Foreign Held Bonds, supra.*

> " 'But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicil of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners,'" and then continued: "This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicil of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession." * * *
>
> "The same doctrine" (that bills and notes may be made by statute leviable upon under execution) "was reaffirmed in *Stockton* vs. *Stanbrough*, 3. La. Ann. 390. Now, if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like situs within the State for purposes of taxation.
>
> "It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. *Graff* vs. *Shannon*, 7 Iowa 508; *Smith* vs. *Eals*, 81 Iowa 235; *Pritchard* vs. *Norwood*, 155 Mass. 539.
>
> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found,

> irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation." 175 U. S. 320, 322.

In *Bristol* vs. *Washington County*, 177 U. S. 133, the taxation of Minnesota real estate mortgages belonging to non-residents of that State, was approved, and the following language of the Minnesota Supreme Court (*In re Jefferson*, 35 Minn. 215) quoted:

> "'Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned, at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business.'"
>
> *Bristol* v. *Washington County*, 177 U. S. 133, 141.

The application of this rule to money deposited in bank and other solvent but unsecured credits, was thus made by Judge Sawyer:

> "No particular number of coins can be set aside as belonging to any particular depositor.

> The general depositary has a right to mingle the money with other moneys; use the surplus moneys deposited as his own and at his own discretion. The deposit is not special; it is simply an open money account. The depositor is only entitled to so much money in amount, and to no particular money, which may or may not be paid when his check is presented, according to the ability and will of the bank with which it is deposited. The depositor is, in law, only a creditor to the amount of the balance held by and due from the bank or banker on an open account. He could not replevy or recover possession of any particular money. The only way to enforce payment would be to bring a suit for any balance due, as in case of money due on any other open account, as for goods sold and delivered. It is but a chose in action. Under the authorities cited, clearly, independent of statutory provisions to the contrary, such credits have no *situs* for taxation against the creditor apart from the person of the depositor."
>
> *City and County of San Francisco* v. *Mackey*, 22 Fed. Rep. 602, 608.

From the more recent decisions, the following language of Taft, J., in *Walker* v. *Jack*, 60 U. S. App. 124, 128, may also be cited:

> "The general rule for determining the *situs* of personal property is that it follows the person of the owner and has its *situs* at his residence. With respect to tangible personal property, however, it is well settled that it may be taxed by the sovereignty having jurisdiction over the place which is its actual *situs*, though the owner live in another jurisdiction. Intangible personal property, however, like choses in action and credits, can, as a general rule, only be taxed at the residence of the owner. *Case of the State*

*Tax on Foreign-Held Bonds*, 15 Wall. 300; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498. The language of the former of these cases has been modified somewhat in *Savings & Loan Soc.* v. *Multnomah County*, 169 U. S. 421, 428, where it was held to be within the power of a state to tax the interest of a non-resident mortgagee in the mortgaged property; but the earlier case is still authority for the general rule that a credit is taxable only at the residence of the creditor."

See, also, *De Vignier* v. *New Orleans*, 4 Woods, 206, 207.

*Yost* v. *Lake Erie Transp. Co.*, 112 Fed. Rep. 746 (C. C. A., VI. Cir.)

II. *Decisions of other States.*

Among the many authorities where the maxim *mobilia personam sequuntur* is applied to the taxation of intangible personal property, the following may be cited:

"We proceed in the second place to consider the nature and character of a debt or chose in action.

"It has not a visible, tangible form. The note, bond, or account even, may be evidence of a debt, but it is not the debt itself. The specific money when loaned, and received by the borrower, is no longer the property of the creditor. It is soon merged in the circulating mass, and the creditor can neither identify and claim it, nor put his hand upon any property purchased with it, and say that that is his. The money may be invested in real estate, or manufacturing, or merchandizing, or speculation. It may prove a profitable investment, or it may in a short time prove a total loss. It is all the same to the creditor so long as his debtor's ability to pay is unimpaired. He has simply a right to receive a given sum of money with interest or damages

for its detention. It is a personal right, and accompanies the person of the creditor. The debtor is under a corresponding obligation to pay the demand. The right to receive is valuable, and through it an income is derived. The right may with propriety be taxed. The obligation to pay is a burden, and has never, to our knowledge, been the subject of taxation. It seems to us therefore that the appropriate place to tax money at interest, is where the creditor resides, and that for that purpose it may with propriety be said to be located with the creditor."

*Kirtland* v. *Hotchkiss*, 42 Conn. 426, 438; affirmed 100 U. S. 491.

"The *situs* of the debt for purposes of taxation and usually for all purposes, is with the creditor."

*Balk* v. *Harris*, 124 N. C. 467, 468.

"The general rule is, that personal property of a tangible character is to be assessed where situated, without reference to the domicile of the owner. Debts and choses in action are a species of intangible property that, for purposes of taxation, are generally held to be situated at the domicile of the owner. A debt owing to a person is evidenced by an account, note, bond or other promise of the debtor, and is a mere chose in action, which goes with the person of the creditor, and can be properly assessed, under the great weight of authority, only in the county where the owner resides. A debt has no *situs* other than the domicile of the owner. It cannot be taxed to the debtor, for in such case it would not be a tax on property or wealth, but would be a tax on the converse and a tax on poverty."

*Scripps* v. *Board of Review*, 183 Ill. 278, 281, 282.

*Haywood* v. *Board of Review*, 189 Ill. 235.

*Matzenbaugh* v. *People*, 194 Ill. 108, 116, 117.

Forcible language was likewise used by Judge Lurton, of the Tennessee Supreme Court, now the senior United States Circuit Judge for the Sixth Circuit:

> "The bond is property, but it is the property of the owner—the creditor, and not the debtor. It is not like shares of stock, which is not a debt but which represents the interest owed by the stockholder in the profits of a business conducted here by his agents. The owner of the bond has no interest in the business of the corporation, and no control over it whatever. The losses of the business must be borne and its profits shared by the stockholders. In all this the creditor, by bond or otherwise, has no interest other than that which every creditor has in seeing his debtor preserve an ability to meet his debts. A tax upon the bond is not a tax upon the corporation. It is tax upon the owner of the bond. Bonds are undoubtedly subject to taxation. But where? By what government? The answer cannot be doubtful. They can only be taxed by the government having jurisdiction of the owner. The *situs* of intangible personals, such as bonds, notes, accounts, etc., is necessarily the *situs* of the owner." * * *
>
> "To sustain the jurisdiction of the State over these bonds for purposes of taxation, we must ignore or contradict the legal fiction which ascribes to such property the *situs* of the owner. If the actual *situs* upon examination should prove to be here, then the legal fiction must yield. But the actual *situs* is not here; and to sustain the jurisdiction we must create a fictitious or constructive *situs*, based upon the notion that debts are in some way property in the hands of the debtor, or that, the security for the debt being here, therefore the debt is here. By no sort of fiction can the jurisdiction of the State be held to extend to the property which a non-resi-

dent has in a debt which he holds against a resident. The creditor cannot be taxed, because he is not within the jurisdiction, and his property cannot be taxed because it is not within the jurisdiction."

*Street Railroad Co.* v. *Morrow*, 87 Tenn. 438.

"In *Curtis* v. *Township of Richland*, 56 Mich. 481 (23 N. W. 175), Mr. Justice Cooley indicates his opinion to be that such was not a proper construction of this section. The statute plainly recognizes the usual rule that credits are to be assessed at the domicile of the owner, and does not attempt to tax those belonging to non-residents. Such credits have no *situs* in this State. See *City of Detroit* v. *Lewis*, 109 Mich. 155 (66 N. W. 958, 32 L. R. A. 439)."

*Village of Howell* v. *Gordon*, 127 Mich. 517, 520, 521.

To the same effect are:

*Inhabitants of Ellsworth* v. *Brown*, 53 Me. 519, 521.
*Catlin* v. *Hall*, 21 Vt. 152, 159.
*Flanders* v. *Cross*, 10 Cush. 510, 514.
*State* v. *Ross*, 3 Zabriskie (N. J.) 517, 525.
*Hopkins* v. *Baker*, 78 Md. 363, 370, 371.
*Balk* v. *Harris*, 124 N. C. 467, 468.
*Mayor, &c., of Mobile* v. *Baldwin*, 57 Ala. 61, 68.
*City Council of Augusta* v. *Dunbar*, 57 Ga. 387, 393.
*Johnson* v. *DeBary-Baya Merchants Line*, 37 Fla. 499, 519.
*State of Mississippi* v. *Smith*, 68 Miss. 79, 83.
*London & Liverpool & Globe Ins. Co.* v. *B. of Comrs.* 51 [illegible]. Ann. 1028, 1031.
*Court* v. *O'Connor*, 65 Tex. 334, 338.
*Prairie Cattle Co.* v. *Williamson*, 5 Okla. 488, 492.

*Worthington et. ux.* v. *Sebastian*, 25 Ohio St. 1, 8.
*Buck* v. *Miller*, 147 Ind. 586.
*City of Louisville* v. *Shirley*, 80 Ky. 71, 76.
*Hutchinson* v. *Board of Commrs.*, 67 Iowa 183, 184.
*Finch* v. *York Co.*, 19 Neb. 50, 52.
*Sanford* v. *Town of Spencer*, 62 Wisc. 230, 231.
*Re Jefferson*, 35 Minn. 215, 220.
*Commissioners of Arapahoe County* v. *Cutter*, 3 Col. 349, 350.
*Holland* v. *Commissioners*, 15 Mont. 460, 461.
*Johnson et. al.* v. *Oregon City*, 2 Ore. 327, 330.
*Walla Walla* v. *Moore*, 16 Wash. 339, 340.
*Estate of Fair*, 128 Cal. 607, 613, 614.
*Barnes* v. *Woodbury*, 17 Nev. 383, 384.

In some of the States indeed the law permits the attachment of an intangible debt due to a non-resident creditor. This, however, is based upon the presence of the debtor within the jurisdiction, and the obvious distinctions between attachment and taxation have been generally recognized by the legislatures as well as by the courts of the various States. In New York, for example, an intangible debt due by a resident debtor to a non-resident creditor, as well as any other "cause of action arising upon contract," may be attached (Code of Civil Procedure, § 648), but such a debt is excluded from the list of taxable personal property (Tax Law of 1896, § 2, sub. 5). Barrett, J., stated some of the reasons for this distinction as follows:

> "There is jurisdiction to attach, but not to tax the debt. The right to attach proceeds upon

the jurisdiction over the resident debtor. There is jurisdiction to compel such debtor to pay what he owes his creditor to the latter's creditor. In that case the attachment does not create the obligation. It enforces it. The tax, however, creates the liability and also enforces it. That can only be done when the person or the property of the creditor is within the jurisdiction. The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor. It can enforce an existing liability, but it cannot create one" (*Matter of Houdayer*, 3 App. Div. 477).

See, also, *Balk* v. *Harris*, 124 N. C. 467, 468.

III. *Other authorities on taxation.*

We may conclude this head by a citation from three text books upon the subject:

"Where a non-resident is owner of tangible property within the state, and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents; neither can the personalty of a non-resident be taxed unless it has an actual *situs* within the state, so as to be under the protection of its laws. The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state. * * *

"These are conceded or adjudged principles, and have ceased to be the subject of discussion or argument. Corporations, it is also conceded, may be taxed like natural persons on their prop-

erty and business. But debts owing to foreign creditors by either corporations or individuals are not the subject of taxation. The creditor cannot be taxed, because he is not within the jurisdiction, and the debts cannot be taxed in the debtors' hands, through any fiction of the law which is to treat them as being, for this purpose, the property of the debtors. They are not property of the debtors in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, 'but to call them property in the hands of the debtors is simply to misuse terms.'"

*Cooley on Taxation* (2d ed.) pp. 21, 22.

"Interests of an intangible character are taxable only where the owner makes his residence, for in contemplation of law they accompany the person of the owner; as, for instance, debts growing in one State to a person in another State are not taxable at the place of the debtor's residence."

*Rorer on Interstate Law*, p. 281.

"The principle therefore established in the construction of State statutes, taxing all property within the scope of their operation, is that the State can tax whatever personal property it can localize within its jurisdiction. * * * Credits owing from citizens of the State to parties outside of it obviously cannot be localized in the State of the debtor. * * * It seems that in order for the debt to be subject to the taxing power of the State, it must be reduced to a concrete form and evidenced in some tangible shape, as in a note or other written obligation, and must be actually in the State in the hands of an agent, or otherwise localized within its confines for permanent, as distinguished from temporary, use."

*Judson on Taxation* (1903), sec. 397, p. 507.

II. THESE PRINCIPLES HAVE BEEN EMBODIED IN THE NEW YORK STATUTORY SCHEME.

Since 1896 the entire subject of taxation has been codified into a single chapter known as the Tax Law (ch. 908 of the laws of 1896; 3 Revised Statutes, Birdseye's third ed., pp. 3525–3614). This law is divided into 281 sections and 12 articles. Article I, comprising sections 1 to 14, is entitled "Taxable Property and Place of Taxation," and is applicable to the entire law (*Matter of Huntington*, 168 N. Y. 399). Article X, comprising sections 220 to 242, is devoted to the Transfer Tax, and is printed as an appendix to this brief. The incidence of the tax is thus prescribed in section 220:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:
>
> "1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.
>
> "2. When the transfer is by will or intestate law, of *property within the state*, and the decedent was a non-resident of the state at the time of his death."

For the purposes of transfer as well as other taxation personal property is defined in subdivision 5 of § 2:

> "The terms 'personal estate,' and 'personal property,' as used in this chapter, include chat-

> tels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate."

By section 7 of the same act,

> "Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital" ("all sums" in original act, ch. 37, laws of 1855) "invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the State." L. 1896, ch. 908, § 7.

This phrase "within the state" or "within this state," is as old as New York's taxing system. It has been a part of its tax law since the Revised Statutes of 1828 prescribed that "all lands and all personal estate within this state" should be liable to taxation (see 1 R. S. 387, Edition of 1829.) The clause "debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate," is taken from chapter 371 of the laws of 1851, entitled "An Act to subject certain debts owing to nonresidents, to taxation."

In recently considering the foregoing definitions, the Court of Appeals held that a non-resident's seat in the New York Stock Exchange was not capital employed in business, nor subject to taxation here (*People ex rel. Lemmon* v. *Feitner*, 167 N. Y. 1), and the Appellate Division of the First Department has within a few days determined that such exemption extends to the transfer tax (*Matter of Hellman*, App. Div., Dec., 1902). Actual capital, however, employed in business by a non-resident decedent, is subject to the latter tax (*Matter of King*, 30 Misc. 575).

While on the one hand it has been held that a non-resident is entitled to the same exemptions as a resident (*People ex rel. Bridgeport Savings Bank* v. *Barker*, 154 N. Y. 128) it has been as distinctly held on the other hand that the taxation of non-residents is purely *in rem* (*City of New York* v. *McLean*, 170 N. Y. 374, 387; *Dewey* v. *Des Moines*, *supra*, 173 U. S. 193, 203; *Bristol* v. *Washington County*, *supra*, 177 U. S. 133, 146.) This latter view apparently eliminates the theory that the non-resident owner of a debt due from a resident may properly be taxed on the ground that the State protects his property rights. This leaves only the protection to the debtor's property to justify taxation, and that taxation is already laid upon the debtor.

It will thus be seen that the New York statutory scheme provides for the taxation of only two forms of debt due from a resident to a non-resident, namely, debts due to a non-resident of the United States for the purchase of land (sub. 5, § 2) and capital of non-residents employed

in business here (§ 7). These two most significant statements of cases where the personal property of a non-resident will be subject to taxation, must have been intended as exceptions to the general rule of exemption for the intangible personal property of non-residents. *Expressio unius, exclusio alterius.*

In considering this statutory scheme the courts of New York have, with the exception of a few recent decisions upon the transfer tax law, to which we shall hereafter refer, followed the conclusions reached by this Court. Thus, Earl, J., said:

> "The power of taxation possessed by the State is a very broad and comprehensive one, and may, with some exceptions imposed by the Federal Constitution and laws passed in pursuance thereof, be exercised upon all objects within its jurisdiction. Persons and property within the State, and trades, avocations and other business carried on within the State, under the protection of its laws, whether by citizens or non-residents, may be taxed. But non-residents' property having no legal *situs* here, and business not carried on here, are beyond the jurisdiction of our State and are not the subjects of taxation here."
>
> *People* v. *Equitable Trust Co.*, 96 N. Y. 387, 393.

While Andrews, J., in one of that Court's earlier considerations of the inheritance tax law, used this language:

> "It is a general rule of law that such property (stocks, bonds and choses in action) attends the owner and has its *situs* at his domicile. It is true that that is a fiction of the law, but it is a

fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent. (*People ex rel. Hoyt* v. *Commissioners*, 23 N. Y. 224; *People ex rel.* v. *Smith*, 88 *id.* 576.)"

*Matter of Enston*, 113 N. Y. 174, 181.

III. THE PRINCIPLES OUTLINED ABOVE APPLY WITH EQUAL FORCE TO TRANSFER OR SUCCESSION TAXES.

In construing succession tax laws, the courts have uniformly decided that jurisdiction of the person of the decedent or of his property must exist. Thus in passing upon the Pennsylvania statute, Mr. Justice Strong of this court, sitting in New Jersey as Circuit Justice, held that various claims against Pennsylvania debtors, Pennsylvania State and municipal bonds and other personal property belonging to a resident of New Jersey but situated in Pennsylvania at the time of his death, were not within that State in such a sense as to be subject to its inheritance tax. In the course of his opinion, the learned justice said:

"It is perfectly clear that the subject of taxation, whatever it may be, must be within the territorial jurisdiction of the state that imposes the tax. Hence a tax law must be construed as applying to nothing extra-territorial, no matter how general its language may be. If a tax be laid upon a person, the person must be within the jurisdiction; if upon property, the *situs* of the property must be in the state. Neither personal nor real property can have a *situs* in two states.

"A person domiciliated in another state, though he owns loans of the commonwealth of

> Pennsylvania, or stocks of its corporations, or claims against its citizens, has no estate by virtue thereof within the commonwealth. His estate or ownership is where he resides, and is taxable there because he resides there. Neither he nor his estate is within the jurisdiction of Pennsylvania."
>
> *Kinzing* v. *Hutchinson*, 14 Fed. Cas. 644, 648 (1877).

Applying this rule the New York Court of Appeals decided that bonds issued by a New York corporation, but in the possession of a non-resident owner at the time of his death and passing by his will to non-resident legatees, were not taxable under the transfer act. It seems impossible satisfactorily to distinguish the present case from that decision. In each there was a debt due a non-resident by a New York corporation, but here instead of there being physical evidence of the debt in the shape of a corporate bond secured, as an examination of the appeal record will show (150 N. Y. 1) by a mortgage on New York land, there was no tangible evidence whatever of the debt, and the debt itself was totally unsecured. In view of these facts the decision seems applicable *a fortiori* and we shall quote from it at some length:

> "Whatever may be argued in support of the right to subject the bonds of domestic corporations to appraisement for taxation purposes under this act, when physically within the state, upon some theory that they are something more than the evidences of a debt and constitute a peculiar and appreciable species of property, within the recognition of the law as well as of the business community, such argument is certainly unavailing in this case; where the bonds themselves

were at their owner's foreign domicile. They did not represent 'property within the state' in any conceivable sense. What property they represented consisted in the debt of their maker and that species of property, unquestionably, must be considered to be, as a chose in action, the holder's and owner's and to be inseparable from his personality. The Supreme Court of the United States held in the Foreign Held Bonds Case (15 Wall. 300), where the state of Pennsylvania assumed to tax the interest payable upon bonds issued by a Pennsylvania corporation, secured by a mortgage upon its property and held by a non-resident, that the tax was invalid. It will be profitable to quote some of the language of the opinion in that case, the soundness of which has never been questioned. * * * It seems difficult to furnish an argument, in support of the view that the debt owing to a creditor is the property, which follows him everywhere, and not the written or printed obligation expressing the indebtedness, that is not resumed in the foregoing opinion. In our consideration of the question, we should not lose sight of the fact that the state, through the Transfer Tax Act, is exerting its taxing power only over that as to which it had jurisdiction for the purposes of taxation; and we should not be confused, in that consideration, by statutes or decisions which bear upon the exercise of that power over residents within its territorial limits. * * *"

"In the James case (144 N. Y. 6), we had occasion to consider the operation of that act. An Englishman, who died abroad, left property deposited within this state, consisting in stocks and bonds of corporations of this and of other states. The question was considered whether, in view of these words in the act, 'which property shall be within this state,' it was its intendment to reach, for purposes of

taxation, any personal property that was not within the state, either in fact or because of the domicile here of its owner. We thought not and that it would be highly improper to impute to the Legislature an intention to tax that over which there was no jurisdiction. It is obvious that the state has no jurisdiction over a right of succession which accrues under the laws of the foreign state. That is something in which this state has no interest, and with which it is not concerned. The legal title to these bonds, or the debts they represent, vested in the personal representatives of the decedent by force of foreign laws. The decedent was a creditor, to whom the obligors in the various bonds were indebted; the extent and terms of whose obligation were evidenced by those bonds. The legal *situs* of the indebtedness was at the creditor's domicile and as the actual *situs* of the bonds themselves was, also, there, upon no theory can it be held that the provisions of the Transfer Tax Act could reach them in its operation."

Gray, J., *Matter of Bronson*, 150 N. Y. 1, 5, 6, 7, 8 (1896).

Following this decision in the *Matter of Preston*, 75 App. Div., 250 (1902) the Appellate Division of the Supreme Court held that bonds secured by mortgage on Brooklyn land but habitually kept by the owner at his house in New Jersey, were not subject to a transfer tax on his death.

So in the *Matter of Phipps*, 77 Hun 325 (affirmed on this opinion in 143 N. Y., 641), the question arose as to the liability of a legacy given by a New York testator to a non-resident, and the court held this right to a legacy was not property within the State. In the course of the opinion, Van Brunt, P. J., said:

> "But a mere chose in action, a right to recover a sum of money, has never, as yet, been given the attribute of tangibility, and this seems to be all that Phipps had at the time of his death. He had a right to claim the amount of money which his share of the residuary estate of Mrs. Fogg would result in, nothing more; no particular piece of property, no particular sum of money, no particular representatives of money or property." (77 Hun 328.)

This case was cited with approval and followed in *Matter of Bronson, supra; Matter of Chabot*, 44 App. Div. 340, 344, and 167 N. Y. 280; *Matter of Abbett*, 29 Misc. 567. In the last mentioned case the property declared exempt was policies of insurance in New York companies upon the life of a resident of New Jersey.

So land in Pennsylvania, belonging to a resident of New York, and equitably converted by her will, was relieved from the inheritance tax in the former State, because by the conversion it had lost its character as land, and the right to the proceeds being a chose in action could only be taxed in New York (*Coleman's Estate*, 159 Penn. St. 231). *In Matter of Sutton*, 3 App. Div. 208, it was held on the other hand that the doctrine of equitable conversion was inapplicable to succession taxes.

While in *Callahan* v. *Woodbridge*, 171 Mass. 595, 598, the Supreme Court of Massachusetts decided that railroad, city, State and United States bonds and "cash in hand" belonging to a non-resident and actually situated in Massachusetts at the time of his death, were subject to the inheritance tax, "because it was all tangible,

passing from hand to hand, and was as completely within the jurisdiction of our laws as ordinary chattels." A note with Kansas City mortgage security, however, was not taxed, notwithstanding the fact that the Massachusetts statute in terms applied to property "tangible or intangible." But as to whether the note and mortgage were or were not property within the jurisdiction, the Court did not deem it necessary to decide (171 Mass. 598).

IV. THE FEW DECISIONS WHERE MONEY IN BANK HAS BEEN SUBJECTED TO A TRANSFER TAX ARE DISTINGUISHABLE FROM THE PRESENT CASE.

The Court of Appeals has sustained the Appellate Division's reversal of the Surrogates' Court in this proceeding upon the supposed authority of *Matter of Houdayer*, 150 N. Y. 37. We shall, therefore, endeavor to show just what was involved in and decided by that case, and why it should not be deemed authoritative here.

(*a*) The deposit here was substantially different both in fact and law.

From the report of that case it appears that one John F. Houdayer died intestate at his residence in Trenton, New Jersey, in May, 1895. In 1876 he had opened an account as trustee under the will of Edward Husson, deceased, with the Farmers' Loan and Trust Company of New York, and had deposited moneys belonging to the trust estate as well as moneys belong-

ing to himself. This lasted as a running account for nineteen years until his death, when a balance of $2,000 was due to him, as trustee, and $71,715 to him individually. The Surrogate of New York County held these sums taxable. The Appellate Division reversed the Surrogate (3 App. Div. 474) and we shall quote from the carefully considered opinion of Barrett, J., in which the views of the Court were expressed:

> "We do not think that the debt was property within this State within the meaning of the Taxable Transfers Act. Much less was the right to an accounting with respect to such debt. It is provided by section 22 of the act in question, that the word property, as used therein, shall 'include all property or interest therein, whether situated within or without this State, over which this State has any jurisdiction for the purposes of taxation.' No more and no less. Not property generally, it will be observed. Not even 'property' as defined by the Statutory Construction Act passed later in the session of 1892 (Chap. 677), for much of what is within its definitions is 'property' over which the State cannot, as against non-residents, have any jurisdiction. Thus the act is in harmony with the authorities which hold that the power of taxation of a state is limited to persons, property and business within her jurisdiction. (Foreign-held Bond Case, 15 Wall. 300.) This jurisdiction, however, is not what the State may choose to assert, but what, as matter of fact, it possesses. Here, for instance, this State has no jurisdiction over the person of the decedent. He was, in fact, a non-resident of this State. It does not appear that he transacted business within this State, so the jurisdiction upon that head was also lacking. The question remains as to his

property. It was distinctly held in the Foreign-held Bond case (*supra*) that debts have no *situs* independent of the domicile of the creditor, and that such debts are the property of the creditor and follow his domicile. It is of no moment in the application of this rule, where the debtor resides or does business, or where he may be found. A debt can have no locality separate from the party to whom it is due. The debt there was evidenced by the bonds of a domestic corporation, but as such bonds were not within the taxing State, as in fact they were in the actual possession of the owner at his foreign domicile, the Supreme Court of the United States held that the property evidenced thereby was not within the taxing State and was not taxable there.

"Thus clearly this State has no jurisdiction, for the purpose of taxation, over the right in action here possessed by the decedent. It asserted no such jurisdiction in the act in question, nor could it have done so. Its jurisdiction, so far as non-resident decedents were concerned, was limited to property which had a visible and tangible existence. As to visible and tangible property, the fiction of a legal *situs* at the domicile of the owner gives way to the fact of the actual *situs*. With regard to choses in action, however, and intangible property generally, the the legal *situs* is, to all intents and purposes, the actual *situs*. (*People ex rel. Hoyt* v. *Commissioners*, 23 N. Y. 224). The debtor is not the debt, and jurisdiction over the debtor is not, for the purposes of taxation, jurisdiction over his obligation." (3 App. Div. 476–7.)

On an appeal to the Court of Appeals this decision of the Appellate Division was reversed by a divided court. As to its reasons the Court differed. Vann, J., wrote an opinion in which only O'Brien, J., concurred.

The majority of the Court concurred in a reversal on the ground "THAT A DEPOSIT OF MONEY IN A BANK, ALTHOUGH TECHNICALLY A DEBT, IS STILL MONEY FOR ALL PRACTICAL PURPOSES, AND AS SUCH IS TAXABLE UNDER THE TRANSFER TAX ACT" (150 N. Y. 41). Gray, J., and Haight, J., dissented for similar reasons to those assigned by Barrett J., in the Appellate Division.

There is no other reason nor argument assigned in support of the judgment now reviewed than that it was controlled by the conclusion we have just quoted from the Houdayer case.

In the present controversy the nature of the deposit was substantially different from that disclosed in the *Matter of Houdayer*. In the latter case there *seems* to have been actual money with the Farmers Loan and Trust Company. Moreover, it was a permanent deposit and had remained there for nineteen years. The Court of Appeals assumed, and we think erroneously, that the Farmers Loan and Trust Company did the business of an ordinary bank. In fact, the only reason assigned for the decision, in which a majority of the Court concurred, was that a *bank* deposit is money "for all practical purposes." In the present case it has been shown precisely what deposits with the United States Trust Company mean (fol. 86). The debt due Mr. Blackstone was not "virtually money," nor could it have been "converted into money upon demand."

"Obligations which circulate as money," as was said in *Hubbard* v. *N. Y. and Harlem R. R.*, 14 Abb. Pr., 275, "are payable on demand," and we think it may be

laid down broadly that for purposes of taxation substitutes for money are not to be deemed money unless they are its exact equivalent.

See

*U. S.* v. *Wilson*, 106 U. S. 620.

*Phila. & R. R. R. Co.* v. *Pollock*, 19 Fed. Rep. 401.

Hence we think it may be said with accuracy in reply to the brief decision in the Houdayer case that in the present case Mr. Blackstone left no "money" in New York; that his debtor there was not a "bank," and that the only "practical purpose" for which his debt could be called "money" was that it was due from a solvent debtor.

In *Matter of Romaine*, 127 N. Y. 80, a portion of the property assessed was permanently "invested" by deposit in New York savings banks, and the pass books were kept there in a safe deposit company.

In the *Matter of Morejon*, N. Y. Law Jour. July, 3, 1891, Surrogate Ransom held "*cash*" in New York banks and bonds in New York safe deposit companies taxable, on the authority of the Romaine case.

In the *Matter of Bondon*, N. Y. Law Jour. March 1, 1892, Surrogate Ransom reached the same conclusion on a like state of facts; and in *Matter of Simoni*, N. Y. Law Jour. January 20, 1896, Surrogate Arnold applied the rule to deposits with a New York firm and trust company which had been habitually kept there.

In the Estate of Spears, 6 Ohio Decisions 598 (Hamilton Probate Court, 1897), a Kentucky decedent's

bonds, stocks and notes in a safe deposit box in Ohio and deposits in an Ohio bank were decided to be subject to the Ohio inheritance tax law, but the fact that some of the property was tangible and some intangible was not discussed in the opinion.

In *Matter of Burr*, 16 Misc. Rep. 89 (N. Y.) the Surrogate of Westchester County felt constrained to follow *Matter of Romaine*, *supra*, in respect to savings bank deposits and money held by the decedents' attorney in New York.

On the other hand in *Matter of Bentley*, 31 Misc. Rep. 656, Surrogate THOMAS distinguished the Houdayer case, and decided that a balance of account with an individual banker in this city, for which no pass book was issued and against which no checks were drawn, had no taxable *situs* in this state.

So in *Matter of Horn*, N. Y. Law Jour., October 31, 1902, Surrogate THOMAS held for the same reason that an indebtedness to a non-resident decedent from a New York joint stock association was not taxable.

Indeed, so far as our investigation has revealed, there is not a single case in the books where an intangible, unrepresented debt due a non-resident has been subjected to an inheritance tax. Where evidences of debt have been taxed it has always been because they were tangible or passed as the equivalent of money or were *capable of larceny*.

Such a debt cannot for purposes of taxation be deemed property in the hands of the debtor, for a debt implies the negative of property.

(*b*) Unlike the Houdayer case the record here shows that this very deposit to Mr. Blackstone's credit had been judicially determined to be subject to, and had paid a legacy tax of $64,625.56 to the State of Illinois, where he resided.

(*c*) The statutory and constitutional points which are brought to the consideration of the Court in this case were not mentioned in the presentation of the Houdayer case. An attempt was made, indeed, to review in this Court the Court of Appeals' decision, but the writ of error was dismissed for want of jurisdiction, because the record failed to show that the unconstitutionality of the New York law had ever been drawn in question or called to the attention of any of the courts of that State.

*Scudder* v. *Comptroller*, 175 U. S. 32.

## POINT II.

IF THE INDEBTEDNESS OF THE TRUST COMPANY COULD UPON ANY THEORY BE REGARDED AS PROPERTY WITHIN THE STATE OF NEW YORK, IT WAS NOT TAXABLE IN THAT STATE BECAUSE IT WAS ONLY TRANSITORILY THERE.

It is a well established canon of law that in the case of property of non-residents *in transitu*, the requisite jurisdiction to tax does not exist.

*Hays* v. *Pacific Mail Steamship Company*, 17 How. 596, 600.

*People ex rel. Parker Mills* v. *Commissioners*, 23 N. Y. 242.

*People ex rel. Hoyt* v. *Commissioners*, 23 N. Y. 224, 240.
24 Am. & Eng. Encyc. of Law, 435.
25 Am. & Eng. Encyc. of Law, 142–3.

This rule, which is founded not only on the commerce clause of the Constitution, but also on the general principles of jurisprudence, has thus been stated in a recent text book:

> "Legal protection and taxation are reciprocal, so that such personal property and effects of a corporeal nature, or that may be handled and removed, as receives the protection of the law, is liable to be taxed by the law where it is thus protected. But this rule does not apply to property which is in *transit*, or which is temporarily within a State, as, for instance, if a resident of one State go into another on a visit or business, traveling in his own conveyance, or carrying with him personal effects for his own use during his temporary stay, or sent into a State for sale, such property is not subject to taxation there, although entitled to and receiving the temporary protection of the law for the time being."
>
> Rorer on Inter State Law, p. 281.

In *Metropolitan Life Insurance Co.* v. *Newark*, 62 N. J. Law 74, the Newark superintendent of a New York life insurance company was in the habit of receiving premiums which he deposited from day to day, and at the end of each week would remit the total amount received, about $4,500 on the average, to the New York office. In holding that this money could not be taxed in New Jersey, the Supreme Court said:

> "It may be conceded, with the views here expressed, that foreign corporations are taxable for all personal property within this state, yet

> neither under the acts which the defendant contends will support this taxation, or any other acts of the legislature, can this assessment be upheld. It is not the personal estate of such foreign corporations within this state. This money is not the capital of such corporation used or to be used here. It has no *situs* here whatever. It is intangible, invisible and in a state of transmission from one hand to the other, and whilst in that state cannot be made the subject of taxation." (62 N. J. Law 77.)

In *Herron* v. *Keeran*, 59 Ind. 472, under a statute providing for the taxation of all personal property within the State owned by non-residents, the Court decided that notes and accounts in the hands of attorneys for collection, and municipal bonds temporarily left with a bank in the State for safe keeping, were not taxable, and said:

> " Here, the notes and accounts in the hands of the attorneys were left with them simply for collection and the remission of the moneys collected to the owner in the State of his residence; and the bonds, on the change of his residence, were temporarily left for safekeeping, not permanently to be used in this State." (59 Ind. 475.)

The Supreme Court of Indiana reached the same conclusion with reference to $4,900 worth of barrel staves piled near a railway track, and which may have been awaiting shipment for a year or more.

*Standard Oil Co.* v. *Bachelor*, 89 Ind. 1.

So this Court in *Coe* v. *Errol*, 116 U. S. 517, affirming the Supreme Court of New Hampshire (*Coe* v. *Errol*, 62 N. H. 303), concluded that logs in course of transportation from Maine, where they had been cut,

through New Hampshire, back into Maine, were not subject to taxation in New Hampshire, although, owing to low water in the stream, they remained in that State during the summers of 1879 and 1880.

Logs banked in the stream and waiting several months for high water were also deemed to be in transit, in *Corning* v. *Township of Masonville*, 74 Mich. 177, while coal stored on a dock at Elizabethport, in transit from Pennsylvania to New England, was likewise exempted from local taxation in *State* v. *Engel*, 34 N. J. Law 425, and *State* v. *Carrigan*, 39 N. J. Law 35.

The inability of a State to tax the vessels of non-residents, while temporarily in its harbors or waters, was recognized in *Hays* v. *The Pacific Mail Steamship Co.*, *supra*, and *Commonwealth* v. *American Dredging Co.*, 122 Pa. St. 386. In the former case, Mr. Justice Nelson said:

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid (17 How. 599–600)."

The application of this principle to inheritance taxation was promptly made. Thus, in *Matter of Enston*, *supra*, it was said:

> "Suppose a foreigner should come here with negotiable securities in his possession for the

purpose of buying property here, and soon after should die here. Or suppose a merchant should come here from some other state with negotiable drafts or securities in his possession and should die here shortly after reaching this state; can it be supposed in either of such cases that it was the legislative intent that before the property of the decedent could be taken out of this state to the jurisdiction of his domicile it should be subjected to a tax to enhance the revenues of the state?" (113 N. Y. 182).

And in the *Matter of Romaine*, 127 N. Y. 80, similar language was used at pages 88–89:

"The appellant further contends that the property in question was not 'within this state,' according to the true meaning of the statute, and the contention is supported by the argument that it would be unreasonable to tax money found upon the person of a non-resident who died while traveling in this state. We should hesitate before applying the statute to any property casually brought into the state for a temporary purpose, as by a visitor or traveler, but the record before us does not present such a case. It might well be held that such property, although literally 'within this state,' was not here in the sense meant by the statute, on account of the transitory and accidental character of its presence and the immediate custody of the owner (*Herron, Treasurer*, v. *Keeran*, 59 Ind. 472, 476.) Where, however, the money of a non-resident is invested in this state, as it was by Mr. Romaine in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a non-resident is habitually kept, even for safety, in this state, we think that the statute applies both in the letter and spirit."

Upon the authority of these two last cases Surrogate Fitzgerald decided in the *Matter of Leopold*, 35 Misc. Rep. 370 (N. Y.), that a deposit of $100,000 made by a non-resident testator in New York City, three days prior to his death, was not liable to a transfer tax. The deposit there was for the purpose of purchasing shares of stock in the Continental Tobacco Company, a corporation organized under the laws of New Jersey, but which in fact was financed in New York.

The Leopold case was cited by Surrogate Fitzgerald in deciding that Mr. Blackstone's estate should pay no transfer tax in New York (fol. 113). He could see no difference in principle between the two cases (fol. 113), and we have been equally unable to establish any substantial distinction.

Viewing the facts shown in the present record in the light of the authorities quoted under this head, we think that Surrogate Fitzgerald's conclusion commends itself as consonant both with law and justice. It is true that the account with the trust company was left open for fourteen months before Mr. Blackstone's death, while the Leopold deposit was in New York only three days before the testator died, but the proof is clear and entirely uncontradicted that Mr. Blackstone's failure to withdraw the deposit from the trust company was due solely to continuously incapacitating ill-health, and that this malady increased steadily from March, 1899, until it resulted in his death in May, 1900. It was his expressed intention to leave the proceeds of the Chicago and Alton stock with

the trust company temporarily until they could be invested in satisfactory corporate stocks or bonds, and to keep these stocks and bonds, when purchased, at his domicile in Chicago. Shortly after the sale of the Alton stock he actually invested a portion of the proceeds in Illinois Central stock, but was prevented by his increasing ill-health from investing the remainder thereof (fol. 94). Several times he expressed the disappointment which he felt at his inability to complete such investment, and said that this inability was resulting in great pecuniary loss to him. It will further be noticed that his energies were devoted to investing the proceeds of the stock which he held as trustee under the Norton will and that he succeeded in completing such investment by August 10, 1899 (fol. 94). This was his last effort. Now whether the period of incapacity lasted for three days or three years seems immaterial. The temporary character of the situation of the indebtedness in the State, and the fixed purpose to remove it at the earliest practicable time, a purpose which was only frustrated by death, constitute the controlling facts. So there was clearly "the intention and purpose to remove it within a reasonable time," which the Court of Appeals for the Ninth Circuit declared to be necessary in order to constitute property *in transitu* (*State Trust Co.* v. *Chehalis County*, 48 U. S. App. 190, 202, 1897).

Nor was the fund in question circumstanced like the property involved in the *Matter of Romaine*, *supra*. The deposit in the trust company was in no sense

"invested" in New York, nor was it "habitually kept" there. On the contrary, it was remaining there awaiting investment, and would have been promptly removed had the owner possessed the strength. Mr. Blackstone, in effect, said to the trust company, when it bought his stock for the syndicate: "I will collect these proceeds as soon as possible. Keep them for me until I am able." Suppose he had come to New York on March 31, 1899, delivered his stock to the trust company, received its check for the price, been taken ill at a hotel there and detained there by such illness until his death, could it be said that the uncollected deposit or the trust company's unpresented check therefor, would have been taxable in this State? If his illness had continued for a year instead of a day, would the legal aspect have been changed?

It will not be forgotten that in attempting to assess the property of a non-resident the burden is upon the taxing authority to establish the jurisdictional conditions (*Corn* v. *Cameron*, 19 Mo. App. 573). As was said by Ruger, Ch. J., in *McLean* v. *Jephson*, 123 N. Y. 142, 151, the "authority to assess depended upon the fact that he (the non-resident) was engaged in business, and not upon appearances which might be deceptive and uncertain."

## POINT III.

A CONSTRUCTION OF THE STATUTE WHICH PERMITS DOUBLE TAXATION, SHOULD BE AVOIDED.

The general attitude of the courts upon this question has thus been described by a recent commentator:

> "The Courts also will do their utmost to prevent double taxation, and will construe a taxation statute so as to avoid such a result, and sometimes even in opposition to the plain words of the statute itself."
>
> 2 Cook on Corp. § 567.

This view finds support in the following language of Chief Justice Waite:

> " Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."
>
> *Tennessee* v. *Whitworth*, 117 U. S. 129, 137.

As characterized by Earl, Ch. J., in *People ex. rel. Savings Bank* v. *Coleman*, 135 N. Y. 231, 235, double taxation is " against public policy, the purpose of the laws and natural justice;" and he added " if that had been attempted, some way would have been found to defeat it."

In the well-known case of *People ex rel. Hoyt* v. *Commissioners*, 23 N. Y. 224, Chief Judge Comstock considered the maxim *mobilia personam sequuntur* in its

relation to taxation. "The proper use of legal fictions," he says, "is to prevent injustice, according to the maxim '*in fictione juris semper æquitas existat*,'" and deduced the conclusion that in case of movables, there is no room in a well adjusted system of taxation for the fiction that they follow the domicile of the owner.

> "In such a system," he continues, "*a fundamental requisite is that it be harmonious.* But harmony does not exist unless the taxing power is exerted with reference *exclusively either* to the *situs* of the property, *or* to the residence of the owner. *Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power.* Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule. If then proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicile, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicile, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given." * * *
>
> "The statute means one thing or the other. It cannot have double and inconsistent interpretations. And as this is impossible so we cannot, under and according to the statute, tax the citizen of Massachusetts in respect to his chattels here, and at the same time tax the citizen of New York in respect to his chattels having an actual *situs*

there. In both cases the property must be 'within this State,' or there is no right to tax it at all" (23 N. Y. 228–9, 230).

The Court of Appeals' decision in the present case is, we submit, a violation of that "fundamental requisite" of harmony prescribed by Chief Judge Comstock, and gives the statute "the double and inconsistent interpretations" he so forcibly condemns. The proof in this case shows (fol. 96) what the New York courts (*Matter of Dingham*, 66 App. Div. 228) and statutes (3 Revised Statutes, Birdseye's Third Edition, p. 3526, sub. 5) expressly declare, that where residents of New York die leaving deposits to their credit in banks of other states, these deposits are appraised and taxed under the Transfer Tax law. It would be manifestly unjust and "impossible," in taxing citizens of other states, to adopt the contrary theory and hold that the doctrine of *mobilia personam sequuntur* did not apply.

In a later case the same court showed its strong disinclination to encourage even the possibility of double taxation. Two resident testamentary trustees of a New York testator were assessed there for personal taxes. The securities constituting the trust estate were in the actual custody of a third trustee who, together with the beneficiaries, resided in New Jersey. It was contended by the municipal authorities that the relators were liable under § 2 of the Tax Law, *supra*, defining "personal property" to include among other things "debts and obligations for the payment of money due or owing to persons residing within this state however secured or *wherever* * * *held*." But the Court dismissed

the claim, saying through Mr. Justice Peckham, who was then on that bench:

> "The contention of the counsel for the tax commissioners would render property liable to double, or even treble, or still greater taxation, if the laws of other states were like ours and there were three or more trustees living in as many different states. The statute as it is may lead to injustice in the double taxation of personal property, once to its absolute owner in this state, and again in the hands of his agents in the shape of securities in their custody and control in other states. It is not for courts to widen the possible injustice which may be perpetrated under a statute, by giving it a construction not only not called for by its language, but forced and unnatural under the circumstances. * * * We think that it plainly appears that the construction adopted by the learned General Term may lead to such a perversion of justice that no court ought to adopt it, unless constrained by the plainest language of the statute. We are of the opinion that such is not the language of this one."
>
> *People ex rel. Darrow* v. *Coleman*, 119 N. Y. 137, 140, 141.

There has been no hesitation in applying these principles to the working of the inheritance tax. Thus, in the *Matter of Enston*, *supra*, Andrews, J., said regarding the law of 1885:

> "Still further, if a succession tax is demanded and paid here upon the property of a non-resident decedent, that does not answer a claim for a further tax at the place of the decedent's domicile; and thus his estate might, and many times would be, subjected to a double succession tax. There is, in the State of Pennsylvania, a law for

> the taxation of collateral inheritances like that which exists here, and if this estate be subjected to this tax in this state, it may again be subjected to a like tax in that state. All these considerations should lead us to hesitate to put upon section 1 such a construction as would bring within its purview the property of a non-resident decedent left in this state at his death. Upon some of the questions here discussed, the case of Orcutt's Appeal (97 Penn. St. 179), is an instructive authority" (113 N. Y. 182, 183).

In the *Matter of James*, 144 N. Y. 6, the law of 1887 was under review, and the Court adopted the same principle:

> "To this view we are all the more disposed because to hold otherwise might be to subject this estate to taxation both in Great Britain and in this State. Such a result of a double taxation is one which the Courts should incline to avoid; whenever it is possible, within reason, to do so" (Gray, J., 144 N. Y. 11).

See also, the dissenting opinion of Haight, J., in *Matter of Romaine, supra* (127 N. Y., 80, 91).

It will be noticed that the general judicial disposition thus manifested to avoid double taxation upon the same property, is founded on considerations arising *ex debito justitiae* rather than *ex comitate*, but going beyond these, the late Judge Cooley, in his work on taxation, advances an important distinction between merely taxing the same property twice, and taxing the same property twice *to the same person*. The former is admittedly unjust, and every intendment will be against it; yet it will be tolerated, if no escape can be found. This is based upon the *argumentum ex necessitate*. Tax sys-

tems are not perfect, and sporadic inequality and injustice may be unavoidable evils. Instances of this form of double taxation are taxing both a corporation and the holders of its stock; taxing the mortgagor on the land and the mortgagee on the debt; taxing any property sold on credit to the vendee at its full value, and to the vendor on the amount of unpaid purchase money; and in cases where the taxpayer removes to another taxing jurisdiction with a different date for the levy. But the second form of double taxation Judge Cooley deems to be inherently unconstitutional. This distinction will best be illustrated by quoting his own language:

> "It has been remarked on a preceding page, that, when personal property is taxed, duplicate taxation is sometimes imposed. By this was meant that such property sometimes, after being subjected to one levy for the support of government for the current year, is by a change of circumstances subjected to taxation a second time for the support of government during the same period" (p. 219). * * *
>
> "There is also sometimes what seems to be a double taxation of the same property to two individuals; as where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt" (p. 220). * * *
>
> "There is a sense, however, in which duplicate taxation may be understood—and which we think is the proper sense—which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood *the requirement that one person or any one subject*

*of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once*" (p. 225). * * *

"It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time" (p. 227).

A recent decision of the Supreme Court of Michigan supplies an instructive instance of this doctrine (*Detroit Citizens Street Railway Company* v. *Common Council*, 125 Mich. 673). It was there held (p. 694) that the double taxation of the property of the same corporation was inherently unconstitutional and void.

Still further beyond the foregoing considerations is the logical impossibility of two taxes in different states on a subject, namely, the right to transmit property, which is conferred by only one of the states. To say that the State of New York may tax a privilege granted by the State of Illinois, and after the latter state has laid its own burdens on the privilege, seems to us to advocate a form of double taxation, which is not only unjust, but is also a contradiction in terms. This argument, however, will be considered under the next head of this brief.

## POINT IV.

AS SUCCESSION, INHERITANCE AND TRANSFER TAXES IN THE UNITED STATES ARE LEVIED UPON THE POWER TO TRANSMIT THE TITLE TO PROPERTY, AND NOT UPON THE PROPERTY ITSELF, THE STATE OF NEW YORK WAS WITHOUT JURISDICTION IN THIS CASE TO TAX THE EXERCISE OF A POWER WHICH IT DID NOT CREATE AND COULD NOT TAKE AWAY.

That the thing taxed is the right to transmit the title to property, seems to be settled beyond dispute.

I. It has been determined in this Court with respect severally

(1) to the Federal legacy tax:

*Knowlton* v. *Moore*, 178 U. S. 41.
*Eidman* v. *Martinez*, 184 U. S. 578, 589.
*Moore* v. *Ruckgaber*, 184 U. S. 593, 596.

(2) to the New York transfer tax:

*United States* v. *Perkins*, 163 U. S. 625.
*Plummer* v. *Coler*, 178 U. S. 115.
*Orr* v. *Gilman*, 183 U. S. 278, 289.

(3) to the Illinois inheritance tax:

*Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 288.

In *United States* v. *Perkins*, *supra*, Mr. Justice Brown explained the principle thus:

> "In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition

that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee" (163 U. S. 628).

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it" (163 U. S. 630).

II. The New York transfer tax has been repeatedly interpreted in that way by the Court of Appeals:

*Matter of Swift*, 137 N. Y. 77, 88.
*Matter of Merriam*, 141 N. Y. 479, 484.
*Matter of Hoffman*, 143 N. Y. 329, 331.
*Matter of Bronson*, 150 N. Y. 1, 6.
*Matter of Westurn*, 152 N. Y. 93, 99.
*Matter of Sloane*, 154 N. Y. 109, 113.
*Matter of Dows*, 167 N. Y. 227, 232.
*Matter of Pell*, 171, N. Y. 48, 55.
*Matter of Vanderbilt*, 172 N. Y. 69, 72–4.

III. Such is also the view taken in other States.

*Finnen's Estate*, 196 Pa. St. 72, 75.
*Minot* v. *Winthrop*, 162 Mass. 113.
*Kochersperger* v. *Drake*, 167 Ill. 122.
*Schoolfield's Executor* v. *Lynchburg*, 78 Va. 366.
*State* v. *Dalrymple*, 70 Md. 294.

*State* v. *Hamlin*, 86 Me. 495.
*State* v. *Alston*, 94 Tenn. 674.
*In re Wilmerding*, 117 Cal. 281.
*Gelsthorpe* v. *Furnell*, 20 Montana 299.

It thus appears that the tax in question has been definitively determined to be a tax upon the power to transmit property by will, or through the operation of intestate laws. It seems difficult to understand how, as thus limited, a tax upon the power can be imposed by any other sovereignty than the one which creates the power. The transmission of Mr. Blackstone's property was effected solely by the law of Illinois (*Eidman* v. *Martinez*, *supra*, 184 U. S. 592; *Kintzing* v. *Hutchinson*, *supra*, 14 Fed. Cases 649). It may be that in some other form, or upon some other theory, the intangible personal property of a non-resident may be subject to a tax or duty. The law of Great Britain, which is hampered by no constitutional restrictions, and which has elaborated a far-reaching and complicated system of taxation, furnishes seven examples of different kinds of governmental impositions under the general head of "death duties." These are clearly differentiated, and are subject in operation to distinct rules of construction. The following, which are the most important of the seven classes, have already been reviewed by Mr. Justice White in *Knowlton* v. *Moore*, *supra*:

(1) *Probate Duty.* This is the original form of death duty and dates back to 1694. It received its name from being collected by means of a stamp impressed upon the letters testamentary

or of administration, and has been defined by Hanson to be the price paid for clothing the executor with the right to take possession of the personal estate of the decedent. It follows "that it is only payable in respect of personal property within the jurisdiction of the Court by which the grant is made and from which, therefore, the authority of the executor emanates."

Hanson's Death Duties, 4th ed., 1, 2.

As it was expressed by the Court of Appeals, "Probate duty attaches to bona notabilia in the place where the goods are situate, wholly irrespective of the question of the domicil of the testator."

*Laidlay* v. *The Lord Advocate*, L. R. 15 App. Cases, 468, 483.

This duty now applies only to decedents who died before August 2, 1894, and is substantially superseded by the estate duty, established by the Finance Act of 1894 (Norman's Digest of the Death Duties, 2d Ed. Introd., p. 1).

(2) *Legacy Duty.* This like probate duty is confined to personal property, but it differs from probate duty by looking to domicil and not to jurisdiction, and is controlled by the doctrine that *mobilia personam sequuntur.* Originally a mere stamp duty on the receipt given by the legatee or next-of-kin, it became in 1796 and still remains a duty on the property actually given to or devolving upon the legatee or next-of-kin.

Hanson's Death Duties, pp. 19, 20.

(3) *Succession Duty.* This "is a tax placed upon the gratuitous acquisition of property which passes on the death of any person by means of a transfer (called either a disposition or devolution) from one person (called the predecessor) to another person (called the successor)" (Hanson, p. 40). It covers both real and personal property, with the limitation that the personal property is not subject to the legacy duty. It does not cover personal property, tangible or intangible, situated in Great Britain, but belonging to a non-resident decedent.

*Wallace* v. *The Attorney General*, L. R. 1 Ch. App. 1.

*Attorney General* v. *Campbell*, L. R. 5 H. L. 524, 529.

With respect to these two still active duties, which resemble our succession taxes, Mr. Dicey in his *Conflict of Laws* (edition of 1897, with Moore's American Notes), enunciates the following "general principle" and "rules":

"Legacy duty and succession duty are imposed on that movable property, and on that movable property only, which the legatee, distributee, or to use a more general term, the successor, claims under, or by virtue of British law. (p. 785–6).

"RULE 1. The movable property of a deceased person who has not died domiciled in the United Kingdom is, wherever locally situate, not liable to legacy duty. (p. 788).

"RULE 2. The movable property of a deceased person who has died domiciled in the United Kingdom is, wherever locally situate, liable to legacy duty. (p. 788).

"RULE 3. Movable property wherever situate which a successor claims under a will, or under the intestacy of a deceased person dying domiciled out of the United Kingdom, is not liable to succession duty. (p. 789).

"RULE 4. Movable property wherever actually situate, which a successor claims under a will or other instrument executed by a person dying domiciled in the United Kingdom, is (in general) liable to succession duty (?)." (p. 789).

(4) *Estate Duty.* This was added to the law by the Finance Act of 1894. "What it taxes is not the interest to which some person succeeded on a death, but the interest which ceased by reason of the death." (Hanson, 63; Norman's Digest, 184, 513).

Hence it is the most far-reaching of all so-called death duties. "It is leviable in respect of all property, both real and personal, of which the deceased could dispose, or in which an interest shifted by reason of his death" (Hanson, p. 63). In the case of a resident it attaches to all his personal property wherever situated, and in the case of a non-resident will be leviable on all his property, whether real or personal, situated in Great Britain. Whether in the case of a non-resident the estate duty would not under some circumstances be a tax upon property and not upon a change in the status or ownership of the property, it is not necessary now to consider. In practice, however, ancillary probate or administration is a pre-requisite to obtaining possession

> of or collecting personal property belonging to a non-resident. Hence in this respect estate duty is akin to probate duty, and may be regarded, unlike any succession tax in this country, as a charge for empowering the executor or administrator to reduce such property to possession.

Even under the present New York law, which is in terms a tax upon the transfer of title, doubt as to its precise nature has occasionally suggested itself to the courts of that State.

Thus in the *Matter of McPherson*, 104 N. Y. 306, 317, where the constitutionality of the first inheritance tax act of 1885 was under consideration, the Court through Earl, J., said (p. 306):

> "It is not very important to determine in this case whether the act of 1885 is to be regarded as imposing a tax upon property or upon the succession or devolution of property by will or intestacy. In either case it is a special tax. In the one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. * * * Taxes of a similar character were quite extensively imposed by the acts of Congress passed during the late civil war. If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs."

In the *Matter of Swift*, 137, N. Y., Gray, J., was of

the opinion that so far as the personal property of a non-resident was concerned, the tax was one upon the property and not upon the succession. A majority of the court, however, did not agree with this opinion (p. 88). Again, in the *Matter of James*, 144 N. Y. 6, Gray, J. in speaking for the court uses language which seems to point to this same conclusion.

In *Matter of Pell*, 60 App. Div. 286, the Appellate Division in the First Department distinctly held that the amendment by chapter 76 of the laws of 1899, imposing a tax upon remainders and reversions which vested prior to June 30, 1885, was a tax upon property and not upon the right of succession, and was constitutional. The court was of the opinion that viewed as a tax upon succession such an imposition would be unconstitutional as in violation of rights which had vested before the adoption of any inheritance tax legislation. In reversing the Appellate Division and holding the tax to be unconstitutional, the Court of Appeals adhered to its previous decisions that the tax was upon the succession, and added that even if viewed as a tax on property the amendment of 1899 would still be unconstitutional. (171 N. Y. 48). The possible limitations of the succession tax theory where non-residents' estates were concerned, may have been in the mind of the Supreme Court of Massachusetts in passing upon the validity of the inheritance tax law of 1891, which provided "that all property within the jurisdiction of the Commonwealth, and any interest therein, whether belonging to inhabitants of the Commonwealth or not,

and whether tangible or intangible, which shall pass by will or by the laws of the Commonwealth regulating intestate succession," etc., should be subject to a tax. Thus in the opinion the court said:

> "But the right or privilege taxed can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property. *The tax too has some of the characteristics of a duty on the administration of the estate of deceased persons.*" (*Minot* v. *Winthrop*, *supra*, 162 Mass. 124).

This last sentence was quoted with approval in *Frothingham* v. *Shaw*, 175 Mass. 59, 61, where the question involved was the power of levying an inheritance tax upon bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bonds secured by mortgage on New Hampshire land and cash on deposit with a savings bank and with individuals in Brooklyn. This property belonged to a Massachusett's testator and letters testamentary were issued to the executor thereof in that State. Under those letters the executors took possession of all the property; and there had been no administration in New York. It was determined that this property was "within the jurisdiction of the Commonwealth," as required by the act of 1891, and that the succession took place under the Massachusetts law. In the course of the opinion, Morton, J., said:

> "Moreover, it is to be observed, if that is material, that there has been no administration

> in New York, that the executor was appointed here, and has taken possession of the property by virtue of such appointment and must distribute it and account for it according to the decrees of the courts of this Commonwealth. To say, therefore, that the succession has taken place by virtue of the law of New York would be no less a fiction than the petitioners insist that the maxim *mobilia sequuntur personam* is when applied to matters of taxation" (175 Mass. 63).

Treating the converse state of facts and holding that intangible personal property belonging to a non-resident of New York but alleged to have a *situs* in that state, was not subject to its transfer tax law, Barrett, J., has spoken with equal emphasis in the Appellate Division opinion in the Houdayer case, from which we have already quoted:

> "As to residents, the tax has been repeatedly held to be a tax upon the right of succession under a will, or by devolution, in case of intestacy (*Matter of Swift*, 137 N. Y. 77; *Matter of Merriam*, 141 *id.* 484). This precise rule has never yet been extended in terms to non-resident decedents, and that question is an open one, unless indeed, the general rule which the Court of Appeals laid down in the Swift and Merriam cases was intended to cover non-resident as well as resident decedents. There would certainly seem to be a distinction between the two classes. In the case of residents, the right of succession or devolution is given by the State which imposes the tax. That State may limit the right as it pleases. Consequently it was held in the Merriam case, that, assuming that the legacy there in question vested 'at the moment of testator's death, yet in contemplation of law the tax was fixed on the succession at the

same instant of time.' Can this be said where the estate or legacy vests under the laws of a foreign State? Does not the person in whom the estate vests and who comes to this State to secure possession of property of the decedent situated here, so come possessed of the legal title to such property? The right of succession is not conferred upon him by the laws of this State, but by the laws of the State where the decedent resided and died. It would seem, therefore, that as against such a person the tax, however it may be obscured or styled, is essentially a tax upon property within our jurisdiction, and not upon the right of succession thereto. If it is upon the right of succession, then plainly it is a tax upon a right granted by a foreign State. If it is not a tax upon such right, then it is simply a tax upon property acquired through the instrumentality of a foreign succession law. And that in substance is what it is. In common parlance it is a succession tax. But in legal parlance it is, as was intimated in the *Matter of James* (144 N. Y. 10), 'a tax upon property in this State passing from non-resident decedents.' The latter case distinctly holds that 'it is the property of the decedent which is sought to be subjected to the tax'; and that 'the right of the State to impose the tax is based upon its dominion over what property is situated within its territory'" (3 App. Div., N. Y. 478–9).

This Court has recently said that "the power of the legislature to tax the personal property of non-residents, both tangible and intangible," is well established, has cited *Mager* v. *Grima*, 8 How. 490, in support of that conclusion (*Eidman* v. *Martinez*, 184 N. Y. 578, 582), and has added that the real question is whether any particular legislative act expresses such an intent. In

the Mager case it was held that the State of Louisiana might impose a tax of ten per cent. of the value of any property passing under the Louisiana laws to any *alien* heir, legatee or donee. This case, it will be noted, involved a tax on property passing to an alien, and the principal reason assigned by the Court for upholding the law was that as the state could escheat the entire property of an alien, it could retain a part of such property by way of tax. This reasoning surely is not applicable to property passing to a citizen of another State of the Union. Some of the language of Chief-Justice Taney's opinion was more general, but, we submit, the thing decided was not what is now under consideration. In *Eidman* v. *Martinez*, the question again involved a tax on legacies to aliens. The Louisiana statute of 1842 (Act No. 154, § 4) construed in the Mager case, was limited to a tax of ten per cent. on successions passing to aliens. It is still in force as article 1221 of the Revised Civil Code of 1900, and seems to be the only form of succession tax then or now imposed in that state. Successions passing to citizens of another state could not, of course, have been subjected to any such duty.

There are, however, other significant features presented by *Eidman* v. *Martinez*. That case, it will be remembered, determined that the War Revenue Act of 1898 did not impose a legacy tax upon federal, municipal and corporate bonds belonging to a non-resident alien, which at the time of his death, were in the custody of his agent in New York, and which passed partly by

his will and partly by the interstate laws of Spain to his son, also a non-resident alien. Ancillary administration was taken out in New York and possession of the bonds obtained. In the course of the opinion Mr. Justice Brown, in discussing the principle *mobilia personam sequuntur*, said:

> "While the enormous increase in the amount and variety of personal property during the past century has necessitated certain limitations of the maxim, particularly in matters of taxation, it is by no means obsolete. It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicil and not by that of its *situs* (*Cross* v. *United States Trust Co.*, 131 N. Y. 330; *Ennis* v. *Smith*, 14 How. 400, 424; *Dammert* v. *Osborn*, 141 N. Y. 564). In matters of taxation, however, and of subjecting the personal property of non-residents to the claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of non-residents within their jurisdiction; and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court (*Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.*, 7 Wall 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Walworth* v. *Harris*, 129 U. S. 355; *Security Trust Company* v. *Dodd*, 173 U. S. 624), and cases there cited" (184 U. S. 581–2). * * *
>
> "The tax in question in this case not being upon the property itself, but upon the succession (*United States* v. *Perkins*, 163 U. S. 625; *Magoun*

v. *Illinois Trust & Savings Co.*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41), laws imposing general taxes on real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. The actual *situs* of the property in such cases cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole question" (184 U. S. 589). * * *

"We do not enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicil as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow, if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country" (184 U. S. 591, 592).

## POINT V.

WHERE ANY DOUBT EXISTS AS TO LIABILITY TO A SUCCESSION TAX, THE DOUBT SHOULD BE RESOLVED IN FAVOR OF THE PERSON SOUGHT TO BE TAXED.

For the purpose of sustaining the State's right to tax the succession to Mr. Blackstone's property, both the Court of Appeals and the Appellate Division of the Supreme Court adopted the broadest construction of the

New York Tax Law. In so doing we believe that they not only did an injustice to his legatees, but also violated the long established rule that special tax legislation, which the transfer tax law has been declared repeatedly to be (*Matter of Enston*, 113 N. Y. 174, 177; *Matter of James*, 144 N. Y. 6, 13; *Matter of Harbeck*, 161 N. Y. 211, 218), must be strictly construed.

In its most recent discussion of the subject this Court has stated our proposition thus:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty (*Warrington* v. *Furbor*, 8 East 242, 247; *Williams* v. *Sangar*, 10 East 66, 69; *Denn* v. *Diamond*, 4 B. & C. 243, 245; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Doe* v. *Snaith*, 8 Bing. 146, 152; *Wroughton* v. *Turtle*, 11 M. & W. 561, 567; *Gurr* v. *Scudds*, 11 Exchq. 190), though the rule regarding *exemptions* from general laws imposing taxes may be different; Cooley on Taxation, 146; In *Matter of Enston*, 113 N. Y. 174, 177.
>
> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. (*Hartranft* v. *Wiegmann*, 121 U. S. 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wigglesworth*, 2 Story 369; *Powers* v. *Barney*, 5 Blatchford 202)."
>
> *Eidman* v. *Martinez*, *supra*, 184 U. S. 578, 583.

The language of Justice Story in the case cited from his reports is as follows:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all Statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such Statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burthens are not to be imposed, nor presumed to be imposed, beyond what the Statutes expressly and clearly import. Revenue Statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."
>
> *United States* v. *Wigglesworth*, 2 Story 369, 373, 374.

In the *Matter of Enston*, Judge Andrews said:

> "The tax imposed by this act is not a common burden upon all the property or upon the people within the state. It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxation, or to be exempted from a common burden imposed upon the People of the state generally, then the authorities cited by the learned counsel for the People, to the effect that an exemption thus claimed must be

> clearly made out, would be applicable. But the executors come into court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law" (113 N. Y. 174, 177, 178).

This conclusion was cited with approval in the *Matter of Bronson*, 150 N. Y. 6, and *Matter of Harbeck*, 161 N. Y. 218, and to the same effect are *Matter of Vassar*, 127 N. Y. 1, 12, *Matter of Stewart*, 131 N. Y. 274, 282, and *Matter of Fayerweather*, 143 N. Y. 114.

In the last cited case, Peckham, J., said:

> "I think it would be a most narrow and unreasonable construction of those words to hold that they do not include a case like this. If there were a doubt upon the question it should be resolved in favor of the taxpayer as represented by the executors and against the taxing power" (143 N. Y. 119).

*United States* v. *Isham*, 17 Wall. 496, 504, and *Ruckgaber* v. *Moore*, 104 Fed. Rep. 947, 951, illustrate the same salutary doctrine. There is certainly no necessary inference from the words of the New York statute, "property within the State," that intangible personal property, belonging to a non-resident, should be taxed. Neither in 1892, when this language was first embodied in the transfer tax law (ch. 399, New York Laws of 1892), nor in June, 1896, when the tax law was codified in its

present form (ch. 908, Laws of 1896), had it ever been held in this country, so far as our investigation reveals, that the devolution or taxation of intangible personal property was to be governed by any other law than that of the owner's domicile. On the contrary the maxim *mobilia personam sequuntur* may be said to have been of universal application in such cases. And even when in October, 1896, the New York Court of Appeals decided in the *Matter of Houdayer*, that a deposit in a New York trust company belonging to a non-resident was liable to the transfer tax, the decision was explicitly founded upon the assumption that such a deposit was for all practical purposes money, or, in other words, localized and tangible property. Hence it seems to us impossible to predicate of the laws of 1892 and 1896 an intention to tax a non-resident's intangible personalty. Nevertheless even if such an intention were arguable, we should be met by the principle of statutory interpretation which was expressed by the late Justice Strong in these words:

> "But, notwithstanding the generality of the statutory words, they must, I think, receive a reasonable construction, in harmony with the construction usually given to such statutes, and consistent with the legislative power of the state."
>
> (*Kintzing* v. *Hutchinson*, 14 Fed. Cases 647).

In a word, we cannot do better than adopt in the present case this significant summary of the situation in a recent Massachusetts case:

> "State inheritance tax laws are apt to aim at

> seizing all that they can get without regard to consistency of principle, but when it is possible to interpret them to mean what is just, we must do so."
>
> *Holmes, C. J.*, 176 Mass. 190, 191.

Two of the most recent of the New York cases on the subject, *Matter of Vanderbilt*, 172 N. Y. 69, and *Matter of Brez*, 172 N. Y. Memo., with their vigorous dissents, supply what may be deemed both examples and warnings of Mr. Justice Holmes' epitome of the present legislative tendency and of the judicial ideal in relation thereto.

## POINT VI.

THE TAXATION IN THIS PROCEEDING OF THE DEBTS DUE MR. BLACKSTONE FROM RESIDENTS OF NEW YORK, WOULD BE UNCONSTITUTIONAL.

In her notice of appearance in this proceeding, in her affidavit in answer to the petition of the Comptroller, and in her notice of appeal to the Surrogates, the plaintiff in error objected to the imposition of any tax, on the ground that it would be in contravention of various specific constitutional prohibitions.

In the preceding argument we have endeavored to show what jurisprudential considerations are involved in the determination of this case. In the light of these considerations we desire now to discuss the constitutional prohibitions which we have invoked. But before taking up these prohibitions separately, it seems

necessary to treat the constitutionality of the New York transfer tax law as interpreted by the judgment of the Court of Appeals, somewhat in mass. The six independent constitutional guaranties upon which we rely interpenetrate each other. We believe that all of these have been violated in the present case; but, in actual analysis, it is not always easy to define the precise limit of each separate infraction. With respect particularly to the fourteenth amendment of the constitution, this Court has not yet deemed it necessary to classify positively the tests of lawful state legislation. There are, however, certain underlying principles of right which the instrument is conceded to protect, and which may perhaps be denominated as within its implication, as distinguished from its expression. To these we shall briefly refer.

In one of the earliest cases in which the application of the constitution to the conflicting claims of citizens of different states was attempted, Mr. Justice Patterson, sitting in the Circuit Court, said with reference to a territorial controversy between claimants under the laws of Pennsylvania and Connecticut:

> "From these passages" (from the bill of rights and constitution of Pennsylvania) "it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a

> community in which he could not enjoy the fruits of his honest labour and industry. The preservation of property, then, is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law."
>
> *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304, 310 (1795).

Three years later this Court had under consideration the power of the legislature of Connecticut to pass an act granting a new hearing in a probate case after the right to appeal from the probate decree had expired, and in the course of the opinion Chase, J., said:

> "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."
>
> *Calder* v. *Bull*, 3 Dallas 386, 388 (1798).

In *St. Louis* v. *Ferry Co.*, 11 Wall. 423 (1870), the right to tax in Missouri ferry boats belonging to an Illinois corporation and only temporarily in Missouri, was denied on the general ground that the jurisdiction to tax was absent. The only specific constitutional objection raised by the ferry company, namely, that the tax was unlawful as a tonnage duty, was not considered by the Court (11 Wall. 432). We quote as follows from page 430:

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens of property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." (11 Wall. 430).

So in The Delaware Railroad Tax Case, 18 Wall. 206, 229, Field, J., said:

> "We proceed, therefore, to the second objection to the act, that it imposes taxes upon property beyond the jurisdiction of the State. If such be the fact the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction."

These decisions manifestly proceed upon the theory which Mr. Justice Miller has described in *Ex Parte Yarborough*, 110 U. S. 651, 658 (1884), namely that

"in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing (is), that which is implied is as much a part of the instrument as what is expressed." So, in disapproving the rule of the New York and New Jersey courts, and holding that a grant of letters of administration upon the estate of a living person was void, the Court through Mr. Justice Gray said:

> "The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive or its judicial authorities. (*Virginia* v. *Rives*, 100 U. S., 313, 318, 319; *Ex parte Virginia*, 100 U. S. 339, 346; *Neal* v. *Delaware*, 103 U. S. 370, 397."
> *Scott* v. *McNeal*, 154 U. S. 34, 45.

During the course of the dissenting opinion in *Adams Express Company* v. *Ohio*, 165 U. S. 194, Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brown, enunciated certain general principles which have special application to the present case:

> "It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions

> of government. This rule, common to all jurisdictions, is peculiarly applicable to the several States of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and, therefore, without violating the Constitution of the United States" (165 U. S., 230).

To the same effect is the language of Mr. Justice Peckham in a still more recent case where the power of a State to authorize a personal judgment for taxes against a non-resident owner was denied:

> "In Cooley on Taxation, 1st ed. p. 121, it is said that 'a State can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another State, than it can subject all the citizens or all the property of such other State to its power.' These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this oversteps the sovereign power of the State."
>
> *Dewey* v. *Des Moines*, 173 U. S. 193, 204.

I. THE PROCEEDINGS UNDER REVIEW IMPAIR THE OBLIGATION OF THE CONTRACTS MADE BETWEEN MR. BLACKSTONE AND THE TRUST COMPANY AND CUYLER, MORGAN & CO., IN VIOLATION OF SECTION 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

The leading case upon this point is *Railroad Company* v. *Pennsylvania*, 15 Wall. 300, usually cited as State Tax on Foreign Held Bonds. The law under review

there required every Pennsylvania corporation paying interest to its bondholders to retain a tax of five per cent. upon the interest paid and to pay this amount semi-annually to the State. The Cleveland, Painesville and Ashtabula Railroad, a corporation of Pennsylvania and Ohio, had issued various bonds, the interest on which was payable in Philadelphia or New York and which were largely held by non-residents of Pennsylvania. The Court held that these bonds followed the domicile of their respective owners; that the State of Pennsylvania had no power to tax the indebtedness, and that such taxation would impair the obligation of the contract evidenced by the bonds. In the course of its opinion the Court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. * * * Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. * * *
>
> "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner;

the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners. * * *

"The tax laws of Pennsylvania can have no extraterritorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents." 15 Wall. 300, 319, 320, 323, 325, 326.

Among the many cases where these conclusions have been approved the following may be cited:

*Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 499.
*Murray* v. *Charleston*, 96 U. S. 432, 448.
*Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499.
*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 208.
*Erie R. R.* v. *Pennsylvania*, 153 U. S. 628, 646.
*Dewey* v. *Des Moines*, 173 U. S. 193, 204.
*New Orleans* v. *Stempel*, 175 U. S. 309, 319.
*Matter of Bronson*, 150 N. Y. 1, 5.
*Cent. Trust Co.* v. *Chat. R. & C. R.*, 68 Fed. Rep. 685, 689 (Clark, D. J., E. D. Tenn.)
*Walker* v. *Jack*, 60 U. S. App. 127, 128.
*Goldgart* v. *People*, 106 Ill. 25, 29.
*Liverpool & L. & G. Ins. Co.* v. *Bd. of Ass.*, 51 La. Ann. 1028 (45 L. R. A. 524).
*City of Detroit* v. *Lewis*, 109 Mich. 155.

As has already been shown, the Court, in *Savings Society* v. *Multnomah Co.*, *supra*, 169 U. S. 421, modified some of the language just quoted so far as it defined

the intangible quality of a real estate mortgage, and held that such a mortgage belonging to a non-resident might be taxed in the State where the mortgaged land was situated. But the general effect of the earlier decision was not limited.

In *Murray* v. *Charleston*, *supra*, the right of the defendant to enforce an ordinance levying a tax on stock issued by that city and belonging to a non-resident, was denied, saying:

> "A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury'" (96 U. S. 444, 445).

The point was made in the case just cited that the power of the city to tax all property within its limits was contained in its charter and that as the stock in question was bought with notice of that power, there was no impairment of the contract. While Justices

Miller and Hunt dissented on this score, the majority of the Court overruled the point, saying:

> "It has been strenuously argued on behalf of the defendant that the State of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made, that by the contracts the city did not surrender this power, that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. We are told the power of a State to impose taxes upon subjects within its jurisdiction is unlimited (with some few exceptions), and that it extends to every thing that exists by its authority or is introduced by its permission. Hence it is inferred that the contracts of the city of Charleston were made with reference to this power, and in subordination to it.
>
> "All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitations. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts." 96 U. S., 444.

See, also, Cooley on Constitutional Limitations, 5th Ed., page 603, where the author says:

> "As the States are forbidden to pass any laws impairing the obligation of contracts, they are of course precluded from levying any taxes which would have that effect. Therefore, as was shown in a previous chapter, if the State by any valid contract has obligated itself not to tax particular property, or not to tax beyond a cer-

tain rate, a tax in disregard of the obligation is void. It is also held that to tax in one State contracts owned in another impairs their obligation, even though they are made and are payable in the State imposing the tax, and are secured by mortgage in that State."

II. THE PROCEEDINGS UNDER REVIEW DENY FULL FAITH AND CREDIT TO THE PUBLIC ACTS AND JUDICIAL PROCEEDINGS OF THE STATE OF ILLINOIS, IN VIOLATION OF SECTION 1 OF ARTICLE IV OF THE CONSTITUTION.

Section 905 of the Revised Statutes, after prescribing the method of authenticating the records and judicial proceedings of the courts of another State, concludes:

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from where the said records are or shall be taken."
>
> See *Hilton* v. *Guyot*, 159 U. S. 113, 181.

In construing these provisions in an early case, Chief Justice Marshall said:

> "This is precisely the same case as that of *Mills* v. *Duryee*. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States."
>
> *Hampton* v. *M'Connel*, 3 Wheat. 234, 235 (1818).

In *Mills* v. *Duryee*, to which the Chief Justice refers, Story, J., used this language:

> "It is argued that this act provides only for the admission of such records *as evidence*, but does not declare *the effect* of such evidence when admitted. This argument cannot be supported. * * *
>
> It remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered" 7 Cranch, 481, 484 (1813).

The record here shows that by an independent legal proceeding instituted in the County Court of Cook County, Illinois, in September, 1900, and terminating by a final order on November 26, 1900, a succession tax upon these New York debts was duly adjudged to be due under the Illinois act of June 15, 1895. This proceeding originated in the appointment of an appraiser; the executrix and all of the legatees appeared by attorney; oral and documentary evidence was submitted; the appraiser's report was made and filed, and a final order of confirmation entered, which taxed the succession (fols. 45–78). The record in that proceeding, duly authenticated in accordance with the provisions of section 905 of the Revised Statutes, is in evidence in this case. If a similar proceeding had been started in any other court in Illinois for the purpose of levying another succession tax upon this property, the judgment in the Cook County proceeding would have had the effect of being a complete bar. When the State of New York subsequently instituted a similar proceeding in the New York Surrogates' Court for the determina-

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tion of the same fact, we submit that the proceedings in the Illinois Court must be awarded the same effect which they would have had in Illinois. Two rights of succession are mutually exclusive and contradictory. There is but one succession, and consequently but one right. If one State lawfully taxes the right, no right remains to be conferred or taxed by any other State.

The condition is not like that which would follow if it were attempted to tax the same property twice. Jurisdiction to tax is either *in personam* or *in rem*. In the case of tangible property the power to tax may be exercised by two jurisdictions. But the sole basis for an inheritance tax is the sovereign power to control the inheritance. That can exist in but one sovereignty.

III. THE PROCEEDINGS UNDER REVIEW DENY TO CITIZENS OF ILLINOIS SOME OF THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF NEW YORK, IN VIOLATION OF SECTION 2 OF ARTICLE IV OF THE CONSTITUTION.

This Court had occasion to consider the meaning of this restriction in *Ward* v. *Maryland*, 12 Wall. 418.

> "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire per-

sonal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

"Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the Court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents" (12 Wall. 430).

Judge Cooley cites this case in his work on Constitutional Limitations, and at page 602 of the 5th edition this language will be found:

"It is also believed that that provision in the Constitution of the United States, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States,' will preclude any State from imposing upon the property which citizens of other States may own, or the business which they may carry on within its limits, any higher burdens by way of taxation than are imposed upon corresponding property or business of its own citizens. This is the express decision of the Supreme Court of Alabama, following in this particular the dictum of an eminent federal judge at an early day, and the same doctrine has been recently affirmed by the federal Supreme Court."

If Mr. Blackstone had been a citizen of New York, and the deposits in question had been due him from a Chicago trust company and firm, there would have been but one succession tax—namely, that levied by the State of New York. The law in Illinois would prevent taxation there (*Scripps* v. *Board of Review*, 183 Ill. 278, 281, 282). As New York has not in the present case adopted the same harmonious rule, we are forced, as Comstock, Ch. J., says, to "impute inconsistency to the law and oppression to the taxing power" (23 N. Y. 229), and to conclude that citizens of Illinois have been denied in New York privileges and immunities which are enjoyed by citizens of the latter State.

IV. THE PROCEEDINGS UNDER REVIEW VIOLATE THE PROVISIONS OF ARTICLE XIV OF AMENDMENT TO THE CONSTITUTION IN THAT THEY (1) ABRIDGE THE PRIVILEGES AND IMMUNITIES OF THE PLAINTIFF IN ERROR AND THE OTHER LEGATEES UNDER MR. BLACKSTONE'S WILL; (2) DENY TO THEM THE EQUAL PROTECTION OF THE LAW, AND (3) DEPRIVE THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

It is conceded that this amendment was not intended to compel the States to adopt in taxation an iron rule of equality (*Giozza* v. *Tiernan*, 148 U. S. 657, 662), and that it is sufficient if the State law is impartially administered, and the same measure of right is guaranteed to a non-resident as is awarded to the State's own citizens (*Eldridge* v. *Trezevant*, 160 U. S. 452, 469).

1. Privileges and immunities are thus defined by Chief-Justice Fuller in a recent case:

> "The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States."
>
> *Giozza* v. *Tiernan*, 148 U. S. 657, 661.
> *Duncan* v. *Missouri*, 152 U. S. 377, 382.

It is clear, we think, for the reasons elaborated above, that the privileges and immunities claimed by the plaintiff in error not only arise out of the "nature and essential character of the national government," but are also "granted and secured by the Constitution of the United States."

2. The equal protection of the law.

Where there is discrimination in favor of resident as against non-resident tax-payers, the latter are denied the equal protection of the laws (*Savings Society* v. *Multnomah County*, 169 U. S. 421, 425). In *Lowe* v. *Kansas*, 163 U. S. 81, 85, it is said that "if the statute is applicable to all persons under like circumstances and does not subject the individual to an arbitrary exercise of power, it has not denied him the equal protection of the laws," and *Duncan* v. *Missouri*, 152 U. S. 377, was quoted in support of that proposition. In *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362, 399, Mr. Justice Brewer said:

> "The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever

form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public."

See, also,

*Gulf, Colorado and Santa Fé Railway Company* v. *Ellis*, 165 U. S. 150, 159–160.
*Tinsley* v. *Anderson*, 171 U. S. 101, 106.

3. Due process of law.

(*a*) Because of the absence of jurisdiction to tax:

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' (*Pennoyer* v. *Neff*, 95 U. S. 814, 733)" *Scott* v. *McNeal*, 154 U. S. 46.

As it is attempted in this proceeding to assess a tax on property which was not within the jurisdiction of the State of New York, and to enforce that tax against the legatees, they are threatened with forcible deprivation of their property without due process of law.

We have already said that jurisdiction to tax depends upon the domicile of the citizen within the State or the existence of his property there. This power "is necessarily limited to subjects within the jurisdiction of the State" (15 Wall. 319). As was said in *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430, "where there is jurisdiction neither as to person nor property the imposition of a tax would be *ultra vires* and void. * * * Jurisdiction is as necessary to valid legislative as to valid judicial action."

If jurisdiction to tax is absent, the statute and the machinery to execute it do not constitute due process of law.

See, also,

*Stuart* v. *Palmer*, 74 N. Y. 183, 190.
Cooley on Constitutional Limitations, 607.

(*b*) Because of the irregularity of the procedure in reversing the Surrogate's decision.

In addition to the broad constitutional reasons upon which we have heretofore dwelt, the record here discloses a technical objection to the course of procedure upon which the judgment of the Court below is based. In order to understand this it will be necessary to revert briefly to the facts. It will be remembered that by the final order of the Surrogates' Court of July 26, 1901, it was adjudged that Mr. Blackstone's property was exempt from any transfer tax under the laws of the State of New York (fol. 109). On August 12, 1902, the Comptroller of the City of New York attempted to appeal from this order to the intermediate court of

review in New York in such cases, namely, the Appellate Division of the Supreme Court in the First Department (fol. 110). The law of New York permits an appeal to be taken by any "party *aggrieved*" by such an order (Code of Civil Procedure § 2558, 1294) within thirty days from the entry thereof (*ib.* § 2571). The plaintiff in error moved to dismiss the appeal of the Comptroller of the City on the ground that he was not a person so aggrieved. This motion was denied by the Appellate Division, and afterwards the order of Surrogate Fitzgerald was reversed and an order entered fixing the tax of $77,536.09. The plaintiff in error then appealed to the Court of Appeals, but the order of the Appellate Division was affirmed and the objection of the plaintiff in error to the incapacity of the Comptroller of the City to appeal was overruled. Examination of the appendix to this brief will show that the Comptroller of the City of New York is neither mentioned in nor recognized by the transfer tax law, and since April 1, 1901, has had no more interest in its administration than the Mayor or the President of the Board of Aldermen, or a private citizen. It is true that prior to April 1, 1901, he had such an interest, but by chapter 173 of the laws of 1901, passed March 22, 1901, and taking effect April 1, 1901, his connection with the transfer tax was wholly terminated, and all of his previous powers and duties in relation thereto were devolved upon the Comptroller of the State of New York.

It is an established principle of law that the right

to appeal is purely statutory. In the present case, without any enabling statute, through an appeal permitted to be taken by an entire stranger, a final judgment exempting the property of the decedent from taxation, has been nullified, and a fresh judgment entered months after the time to appeal from the first had expired, subjecting the property in question to a tax. Our contention is that such procedure was not due process of law.

The principles of law applicable to such a situation are clear and may be briefly stated:

1. The right to appeal is purely statutory.

6 Am. and Eng. Encyc. of Law, 2d Ed. 1001.
2 Encyclopœdia of Pleading and Practice, pp. 16, 19.
*Bryant* v. *Thompson*, 128 N. Y. 426.
*Erie R. R. Co.* v. *Steward*, 9 App. Div. 187, 190 (2d Dept.).

As was said in a recent case:

> "The right to appeal is not a natural or inherent one, but rests upon the statute alone, and may be taken away by the legislature unless conferred by the organic law of the state."
>
> *Szuchy* v. *Hillside Iron & Coal Co.*, 150 N. Y. 219, 224.

2. It is only a person aggrieved by a judgment or an order who may appeal from it.

New York Code of Civil Procedure, §§ 1294, 2568.
*Lawless* v. *Reagan*, 128 Mass. 592.
2 Encyclopœdia of Pleading and Practice, pp. 160, 167.
2 Foster Federal Practice, § 462.

3. A person is not "aggrieved" unless the judgment or order has binding force against his rights, his person or his property.

*Ross* v. *Wigg*, 100 N. Y. 243, 246.
*People ex rel. Banta* v. *Kent*, Gen. Term, 1st Dept., 4 Week. Dig. 62.
*Hobart* v. *Hobart*, 86 N. Y. 636.

4. It must appear that a reversal will benefit the appellant before his appeal can be entertained.

*Hyatt* v. *Dusenbury*, 1 Silvernail, 475 (N. Y. Ct. of Appeals, 1887).
2 Encyclopœdia of Pleading and Practice, 161.

5. The authority of a public officer to appeal must either be specially conferred by statute, or must depend upon the maintenance of rights peculiar to himself.

*People ex rel. Breslin* v. *Lawrence*, 107 N. Y. 607, 609.

6. Where a party's interest in the proceeding has ceased *pendente lite*, he may not appeal.

2 Encyclopœdia of Pleading and Practice, 167.
*Kelly* v. *Israel*, 11 Paige 147, 152.
*Card* v. *Bird*, 10 Paige, 426.
*Reid* v. *Vanderheyden*, 5 Cow. 719, 735.
*Hackley* v. *Hope*, 2 Abb. Ct. of App. Dec. 298.

As was said in the last cited case:

> "Where a party has released all his interests in a suit, he has no right to appeal from an order or decree made therein which does not prejudice him, although it may be wrong as to other parties. *Steele* v. *White*, 2 *Paige* 478. Hackley having transferred and released all his

> interest in the subject matter of the litigation to the defendant Hope, and there being no decree personally against Hackley for costs or anything else, there is no ground upon which his appeal from the decree can by any contingency ever be successful" (2 Abb. Ct. of App. Dec. 300).

In *Reid* v. *Vanderheyden*, *supra*, the Court of Errors had under consideration a probate proceeding where a half brother of the testator had been made a party to the proceeding as one of the next of kin. A posthumous child of the testator was born four days before the entry of the decree admitting the will to probate, and the appeal of the half brother from the probate decree was dismissed. In reaching this conclusion the Court said:

> "It is an elementary principle, recognized in all the books, that a person having no interest in the subject of dispute, cannot be a party litigant. * * * To show the nature and universality of the rule, and illustrate and enforce it, we need only go to the doctrines of a court of equity, where the greatest possible latitude as to parties is indulged. There not only must the original parties have an interest, but that interest is followed in all its changes. Although an action may proceed in some cases in the name of the original plaintiff in trust for others, on whom the interest is cast by operation of law (11 John., 488), yet in equity, even in cases of change of bankruptcy or insolvency, a bill must be filed in nature of a bill or revivor." * * *
>
> "For the purposes of this question, then, he (the half-brother) was at the time of pronouncing the decree by the Surrogate, a mere stranger. When his interest ceased his right to farther litigate ceased with it. All power of appeal was, therefore, gone" (5 Cowen, 733, 735).

In following this decision a few years later the Court of Errors said:

> "That case (*Reid* v. *Vanderheyden*) and the reasoning and authorities by which it is supported abundantly establish the general principle that no person can prosecute a suit in chancery, either by appeal or otherwise, who is not interested in the subject matter; and that although there may have been an interest when the suit was commenced, if such interest is terminated during its progress, his right farther to interfere in the litigation is at an end."
>
> Sutherland, J., *Idley* v. *Bowen*, 11 Wend. 227, 238.

7. In the absence of express words of reservation, statutes changing procedure apply to pending proceedings.

*Railroad Co.* v. *Grant*, 98 U. S. 398, 401.
*Matter of Davis*, 149 N. Y. 539, 545.
*Lazarus* v. *M. E. R. Co.*, 145 N. Y. 581, 586.
*Matter of Sloane*, 154 N. Y. 109.
*Ex parte McArdle*, 7 Wall. 506, 514.

8. Transfer tax procedure and jurisdiction are special, and limited strictly by the provisions of Article X of the Tax Law.

*Matter of Smith*, 40 App. Div. 480.
*Matter of Crerar*, 56 App. Div. 479.

9. The objection may be taken either by motion to dismiss or upon the argument of the appeal on the merits.

*Stoughton* v. *Lewis*, 2 How. Pr., N. S. 331, 333 (Court of Appeals, 1885; s. c., opinion omitted, 98 N. Y. 637).

The Appellate Division did not question any of the foregoing principles, but said that the Comptroller of the City, having applied for the appointment of the appraiser, was authorized to continue to prosecute the proceeding, and to appeal from any order therein, until the Comptroller of the State had been substituted as a party (fol. 146).

We submit, however, that this answer to our contention is not conclusive, for the following reasons:

1. The same answer would have applied to all of the cases cited under the foregoing subdivision 6.

2. In every appeal the appellant must stand upon his own continuing right, and this right is not affected by the existence or non-existence of any other person who is authorized to appeal.

3. No substitution of the Comptroller of the State was necessary, because he was already by statute a person interested in the proceeding, and might have appealed from the Surrogate's order of July 26, 1901.

4. The procedure in the assessment of transfer taxes is not like a common law action. There is no *dominus litis*. "The surrogate, *either upon his own motion*, or upon the application of *any* interested party, including the Comptroller of the State of New York," shall, by order, direct an appraisement (Tax Law, § 230). When that order is made, the proceeding is self-prosecuting. The *appraiser* gives notice of the hearing before him, appraises the property, and draws and files his own report. Upon this report "the surrogate shall forthwith, as of course," determine the amount of

the tax, and the Comptroller of the State or any person dissatisfied may appeal (Tax Law, § 230).

No substitution of parties is made in such proceedings. Any party interested may appear at any stage and without order of substitution. In each proceeding the State, through its authorized representatives, is engaged in collecting its tribute, and the persons whose property is or may be taken, are entitled to notice of the appraisement, and of the order fixing the tax. But no other papers need be served upon them.

(*c*) Because of the failure to deduct from the value of the property the amount of the Illinois inheritance and the Federal legacy tax.

The record shows that before the New York proceeding was begun, Mrs. Blackstone had paid $64,625.56 in satisfaction of the Illinois inheritance tax (fol. 78), and $21,095 in satisfaction of the Federal legacy tax (fol. 94). Upon what theory this aggregate of $85,720.56, or such proportion thereof as the property taxed in New York bore to the decedent's entire estate, was not deducted from the $4,843,456.72 which has been taxed herein, is not clear. The New York statute (sec. 230) requires the property to be appraised "at its clear market value immediately upon such transfer, or as soon thereafter as practicable." Any legal charge against the property would seem to diminish by the amount of the charge the "clear market value" of the property.

So far as the Federal tax is concerned, the reason

assigned in New York for not deducting it, was recently said to be that this tax was levied upon the privilege of the legatee to succeed to the property and was payable out of the legacy and not out of the general estate (*Matter of Gihon*, 169 N. Y. 443, 447). In Massachusetts, the contrary conclusion was reached in *Hooper* v. *Shaw*, 176 Mass. 190, and this appears to be more in accord with the reasoning in *United States* v. *Perkins*, *supra* (163 U. S. 628).

So far as the Illinois tax is concerned, the question seems to be *res nova*. Possibly this may be due to the fact that the present case is the first instance of the imposition of two State inheritance taxes upon the same succession.

With respect to all of the foregoing reasons why the proceedings in the courts below did not constitute due process of law, we may conclude by quoting this language of Mr. Justice Harlan:

> " Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction

of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

*Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, 234–5.

## Conclusion.

In presenting these views to the Court we are not striving to impair the sovereign power of the several states to tax successions. We do, however, urge most earnestly that this power may under the guidance of constitutional restraints, and in accord with established principles of law, be exercised fairly and harmoniously. It is therefore respectfully submitted that

The orders sought to be reviewed herein should be reversed, and the order of the New York Surrogates' Court of July 26, 1901, affirmed and reinstated.

Dated December 30, 1902.

Edward W. Sheldon,
Counsel for plaintiff in error.

# APPENDIX.

## TAX LAW OF NEW YORK.

### ARTICLE X.

TAXABLE TRANSFERS.

In force April 1, 1901.

Section 220. Taxable transfers.
221. Exceptions and limitations.
222. Lien of taxes and payment thereof.
223. Discount, interest and penalty.
224. Collection of tax by executors, administrators and trustees.
225. Refund of tax erroneously paid.
226. Deferred payments.
227. Taxes upon devises and bequests in lieu of commissions.
228. Liability of certain corporations to tax.
229. Jurisdiction of the surrogate.
230. Appointment of appraisers, stenographers, et cetera.
230a. Composition of transfer tax upon certain estates
231. Proceedings by appraisers.
232. Determination of surrogate.
233. Surrogate's assistants in New York county.
234. Surrogate's assistant in Kings and certain other counties.
235. Proceedings for the collection of taxes.
236. Receipt from the county treasurer and comptroller.

237. Fees of county treasurer.
238. Books and forms to be furnished by the state comptroller.
239. Reports of surrogate and county clerk.
240. Reports of county treasurer.
240a. Report of State comptroller; payment of taxes.
241. Application of taxes.
242. Definitions.
243. Exemptions in Article one not applicable.

§ 220. TAXABLE TRANSFERS.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death.

3. When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

4. (Such tax shall be imposed) When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.

5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation

possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

6. The tax imposed thereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section. (*Thus amended by L.* 1897, *chap.* 284.)

§ 221. EXCEPTIONS AND LIMITATIONS.—When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child, to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or to any lineal descendant of such decedent, grantor, donor or vendor born in lawful wed'ock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property. But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation including corporations organized exclusively for bible or tract purposes shall be exempted from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental im-

provement of men or women or for charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, cemetery or historical purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes and used exclusively for carrying out one or more of of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member, or employee thereof shall rec ve or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees—or if it be not in good faith organized or conducted exclusively for one or more of such purposes. (*Thus amended by L.* 1898, *chap.* 88, *and L.* 1901, *chap.* 458, *taking effect April* 22, 1901.)

§ 222. LIEN OF TAXES AND PAYMENT THEREOF.—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. The tax shall be paid to the treasurer in a county in which the office of appraiser is not salaried, and in other counties, to the state comptroller and said treasurer or state comptroller shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment. If such duplicate receipts were received from a county treasurer such executor, administrator or trustee shall immediately send one of them to the state comptroller, and if received from the state comptroller he shall immediately send one of them to the state treasurer. The state comptroller or the state treasurer, as the case may be, receiving such receipt shall charge the officer receiving the tax with the amount thereof and seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the

settlement of his accounts; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof, or unless a bond shall have been filed as prescribed by section two hundred and twenty-six of this chapter. All taxes imposed by this article shall be due and payable at the time of the transfer, except as hereinafter provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. All taxes which, at the time the amendment to this section takes effect, have been assessed by an order of the surrogate, or which have accrued, in a county in which the office of appraiser is salaried, shall be paid to the state comptroller, as provided by this article. *(Thus amended by L.* 1897, *chap.* 284, *and L.* 1901, *chap.* 173; *taking effect April* 1, 1901.*)*

§ 223. DISCOUNT, INTEREST AND PENALTY.—If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section two hundred and twenty-six of this chapter, interest shall be charged at the rate of six per centum from the accrual of the tax until the date of payment thereof.

§ 224. COLLECTION OF TAX BY EXECUTORS, ADMINISTRATORS AND TRUSTEES.—Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such administrator, executor or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer or state comptroller, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.*)*

§ 225. REFUND OF TAX ERRONEOUSLY PAID.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comp-

troller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer, or state comptroller, or if such tax has been paid to such treasurer or state comptroller, he shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed within two years from and after the date of entry of the order fixing the tax, on due notice to the comptroller of the state, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is not salaried, by order, direct and allow the treasurer of the county, to refund, or if paid in any other county, he shall himself refund to the executor, administrator, trustee, person or persons, by whom such tax has been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody, to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this act ; but no application for such refund shall be made after one year from such reversal or modification, and the comptroller of the state shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate who has assessed the tax upon the transfer of property under this article that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. *(Thus amended by L. 1897, chap. 284 ; L. 1900, chap. 382, and L. 1901, chap. 173, taking effect April 1, 1901).*

§ 226. DEFERRED PAYMENT.—Any person or corporation beneficially interested in any property chargeable with a tax under this article, and executors, administrators and

trustees thereof may elect within eighteen months from the date of the transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. If it be personal property, the person or persons so electing shall give a bond to the state in penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed and a full return of such property upon oath made to the surrogate within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years. (*Thus amended by L.* 1897, *chap.* 284).

§ 227. TAXES UPON DEVISES AND BEQUESTS IN LIEU OF COMMISSIONS.—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised, above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article.

§ 228. LIABILITY OF CERTAIN CORPORATIONS TO TAX.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the state comptroller on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the state comptroller at least ten days prior to the said transfer; nor shall any such safe deposit

company, bank or other institution, person or persons deliver or transfer any securities or assets of the estate of a non-resident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said county treasurer or state comptroller, personally, or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination, or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank or other institution, person or persons, liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this article. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.*)*

§ 229. JURISDICTION OF THE SURROGATE.—The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogate's courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter eighteen of the code of civil proceedure shall set forth the name of the county treasurer in a county in which the office of appraiser is not salaried, and in the other counties the state comptroller, as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a cita-

tion directed to such county treasurer or state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the county treasurer or state comptroller were a creditor of the decedent. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 230. APPOINTMENT OF APPRAISERS, STENOGRAPHERS, ET CETERA.—The state comptroller shall appoint and may at pleasure remove, not to exceed five persons in the county of New York; two persons in the county of Kings, and one person in the counties of Albany, Dutchess, Erie, Monroe, Oneida, Onondaga, Orange, Queens, Rennsselaer, Richmond, Suffolk and Westchester,* to act as appraisers therein. The appraisers so appointed shall receive an annual salary to be fixed by the state comptroller, together with their actual and necessary traveling expenses and witness fees, as hereinafter provided, payable monthly by the state comptroller out of any funds in his hands or custody on account of transfer tax. The salaries of each of the appraisers so appointed shall not exceed the following amounts: In New York county, four thousand dollars; in Kings county, three thousand dollars; in Erie county, three thousand dollars; in Westchester county, eighteen hundred dollars; in Albany, Queens, Monroe and Onondaga counties one thousand five hundred dollars; in Dutchess, Oneida, Suffolk, Orange and Rensselaer counties one thousand dollars, and in Richmond county five hundred dollars.

Each of the said appraisers shall file with the state comptroller his oath of office and his official bond in the penal sum of not less than one thousand nor more than twenty thousand dollars, in the discretion of the state comptroller, conditioned for the faithful performance of his duties as such appraiser, which bond shall be approved by the attorney-general and the state comptroller. The state comptroller shall retain out of any funds in his hands on account of said tax the following

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*Not in effect as to underscored counties until January 1, 1902.

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amounts: 1. A sum sufficient to provide the appraisers of New York County with two stenographers, and of Kings county with one stenographer, appointed by the state comptroller, whose salary shall not exceed fifteen hundred dollars a year each. 2. A sum to be used in defraying the expenses for office rent, stationery, postage, process serving, et cetera, necessarily incurred in the appraisal of estates, not exceeding three thousand dollars a year in New York county, and one thousand dollars a year in Kings county. In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion or upon the application of any interested party (including the comptroller of the state of New York), shall by order direct the county treasurer in a county in which the office of appraiser is not salaried, and in any other county the person or one of such persons so designated as appraisers to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article. Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent incumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to

the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed in respect of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this article. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase or benefit from the person from whom the title to their respective estates or interests is derived. When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred ; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this article. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at

their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or an omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting. All estates upon remainder or reversion, which vested prior to May first eighteen hundred and ninety-two, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof. (*Thus amended by L.* 1897, *chap.* 284 ; *L.* 1899, *chap.* 76 ; *L.* 1900, *chap.* 658 ; *L.* 1901, *chap.* 173, *and L.* 1901, *chap.* 493, *taking effect April* 23, 1901.)

§ 230a. COMPOSITION OF TRANSFER TAX UPON CERTAIN ESTATES.—The county treasurer of any county in which the office of appraiser is not salaried, by and with the consent of the comptroller of the state of New York, expressed in writing, and the state comptroller in any other county, by and with the consent of the attorney-general expressed in writing, is hereby empowered and authorized in a county in which they receive payments on account of transfer tax, to enter into an agreement with the trustees of any estate therein situate, in which remainders or expectant estates have been of such a nature, or so disposed and circumstanced, that the taxes therein were held not presently payable, or where the interests of the legatees or devisees were not ascertainable under the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five ; chapter three hundred and ninety-nine of the laws of eighteen hundred and ninety-two, or chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, and the several acts amendatory thereof and supplemental thereto ; and to compound such taxes upon such terms as may be deemed equitable and expedient ; and to grant discharge to said trustees upon the payment of the taxes provided for in such composition ; provided, however, that no such composition shall be conclusive in favor of said trus-

tees as against the interests of such *cestuis que trust*, as may possess either present rights of enjoyment or fixed, absolute or indefeasible rights of future enjoyment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto, either personally, when competent, or by guardian or committee. Composition or settlement made or effected under the provisions of this section shall be executed in tripicate, and one copy shall be filed in the office of the state comptroller, one copy in the office of the surrogate of the county in which the tax was paid, and one copy to be delivered to the executors, administrators or trustees who shall be parties thereto. *(Inserted by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.*)*

§ 231. PROCEEDINGS BY APPRAISER.—Every such appraiser shall fofthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state comptroller, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value as herein prescribed, and for that purpose the said appraiser is authorized to issue subpœnas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid on the certificate of the surrogate, subject to review and audit by the state comptroller, his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, out of any funds he may have in his hands as county treasurer on account of any tax imposed under the provisions of this article. Appraisers appointed under this article in proceedings pending at the time the amendment to this section takes effect shall complete the appraisals therein and file their reports as

herein provided, and shall be entitled to the compensation authorized by law at the time of their appointment, to be paid by the state comptroller in counties in which the office of appraiser is salaried, and in other counties by the county treasurer, out of any moneys in his hands on account of this tax. (*Thus amended by L.* 1900, *Chap.* 658, *and L.* 1901, *chap.* 173, *taking effect April* 1, 1901).

§ 232. DETERMINATION OF SURROGATE. The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the state comptroller. From such report and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser. The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest therein limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct. The comptroller of the state of New York or any person dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the surrogate, within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken. The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties known to be interested therein, including the state comptroller. If, however, it appear at this stage of the proceedings that any of such parties known to be interested in the estate is an infant or an incompetent, the surrogate shall, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a

special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings. Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the comptroller of the state may, if he believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district in which the former owner of such estate resided, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties and receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the county treasurer or state comptroller, out of any funds he may have on account of any tax imposed under the provisions of this article, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the state comptroller, and a certified copy thereof transmitted to the surrogate's court of the proper county. (*Thus amended by L.* 1897, *chap.* 284; *L.* 1899, *chap.* 672, *and L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 233. SURROGATES' ASSISTANTS IN NEW YORK COUNTY.—The surrogates of the county of New York may jointly appoint and at pleasure remove assistants as follows:

1. In New York county, a transfer tax assistant, at an annual salary of four thousand dollars; a transfer tax clerk, at an annual salary of two thousand four hundred dollars; an assistant clerk, at an annual salary of eighteen hundred dollars; a recording clerk, at a salary of thirteen hundred dollars; and

shall be entitled to not more than five hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article. Such salaries and expenses shall be payable monthly by the state comptroller on the certificate and requisition of the surrogates, accompanied by proper vouchers, out of any funds in his hands on account of taxes collected under this article. *(Thus amended by L.* 1898, *chap.* 289, *and L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 234. SURROGATES' ASSISTANTS IN KINGS AND CERTAIN OTHER COUNTIES.—The surrogates of the counties mentioned in this section may appoint and at pleasure remove assistants as follows:

1. In the county of Kings, a transfer tax assistant, at an annual salary of four thousand dollars, and a transfer tax clerk, at an annual salary of two thousand dollars; and shall be entitled to not more than five hundred dollars a year, for expenses necessarily incurred in the assessment and collection of taxes under this article.

2. In the county of Westchester, a transfer tax assistant, at an annual salary to be fixed by the surrogate, of not more than two thousand dollars.

3. In the county of Suffolk, a transfer tax clerk, at an annual salary of seven hundred and twenty dollars.

4. In the county of Oneida, not more than two transfer tax clerks, at an annual compensation to be fixed by the surrogate, of not more in the aggregate than twelve hundred dollars.

5. In the county of Ulster, a transfer tax clerk, at an annual salary, to be fixed by the surrogate, of not more than seven hundred and twenty dollars.

6. In the county of Onondaga, a transfer tax clerk, at an annual salary, to be fixed by the surrogate, of not more than twelve hundred dollars.

7. In the county of Monroe, two transfer tax clerks, at an annual salary of seven hundred and fifty dollars each; and shall be entitled to not more than two hundred dollars a year for expenses necessarily incurred in the assessment and collection of taxes under this article.

8. In the county of Erie, a transfer tax clerk, at an annual salary of eighteen hundred dollars.

9. In the county of Albany, a transfer tax clerk at an annual salary to be fixed by the surrogate, of not more than one thousand dollars.

Such salaries and expenses shall be payable monthly by the state comptroller on the certificate and requisition of the surrogate of each such county, accompanied by proper vouchers, out of any funds in his hands on account of taxes collected under this article. *(Thus amended by L.* 1899, *chap.* 389, *and L.* 1901, *chap.* 173, *taking effect April 1,* 1901.*)*

§ 235. PROCEEDINGS FOR THE COLLECTION OF TAXES.—If the county treasurer or state comptroller shall have reason to believe that any tax is due and unpaid in a county in which he is authorized to receive the tax under this article, after the refusal or neglect of the persons liable therefor to pay the same, he shall notify the district attorney of the county, in writing, of such failure or neglect, and such district attorney, if he have probable cause to believe that such tax is due and unpaid, shall apply to the surrogate's court for a citation, citing the persons liable to pay such tax to appear before the court on the day specified, not more than three months after the date of such citation, and show cause why the tax should not be paid. The surrogate, upon such application, and whenever it shall appear to him that any such tax accruing under this article has not been paid as required by law, shall issue such citation and the service of such citation, and the time, manner and proof thereof, and the hearing and determination thereon and the enforcement of the determination or order made by the surrogate shall conform to the provisions of the code of civil procedure for the service of citations out of the surrogate's court, and the hearing and determination thereon and its enforcement so far as the same may be applicable. The surrogate or his clerk shall, upon request of the district attorney, county treasurer, or the comptroller of the state, furnish, without fee, one or more transcripts of such decree, which shall be docketed and filed by the county clerk of any county of the state without fee, in the same manner and with the same effect as provided by law for filing and docketing transcripts of decrees of the surrogate's court. The costs awarded by any such decree after the collection and payment of the tax to the county treas-

urer or state comptroller may be retained by the district attorney for his own use. Such costs shall be fixed by the surrogate in his discretion, but shall not exceed in any case where there has not been a contest, the sum of one hundred dollars, or where there has been a contest the sum of two hundred and fifty dollars. Whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings specified in this section, the state treasurer shall pay or allow to the county treasurer or the state comptroller all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. In proceedings to which any county treasurer or the state comptroller is cited as a party under sections two hundred and thirty and two hundred and thirty-one of this article, the state comptroller is authorized to designate and retain counsel to represent such county treasurer or state comptroller therein, and to direct such county treasurer in a county in which the office of appraiser is not salaried to pay the expenses thereby incurred out of the funds which may be in his hands on account of this tax, and in any other county the state comptroller shall pay such expenses out of any funds which may be in his hands on account of this tax; provided, however, that in the collection of taxes upon estates of non-resident decedents, which estates have been concealed or the taxes thereon evaded, the state comptroller shall not allow for legal services up to and including the entry of the order of the surrogate fixing the tax a sum exceeding ten per centum of the taxes and penalties collected. And the comptroller of the state is hereby authorized, with the approval of the attorney-general, and a justice of the supreme court of the judicial district in which the former owner resided, to compromise and settle the amount of such tax in any case where controversies have arisen or may hereafter arise as to the relationship of the beneficiaries to the former owner thereof. (*Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 236. RECEIPT FROM THE COUNTY TREASURER AND COMPTROLLER.—Any person shall upon the payment of the sum of fifty cents be entitled to a receipt from the county treasurer of any county or the state comptroller, or at his option to a copy of a receipt that may have been given by such treasurer or

state comptroller for the payment of any tax under this article, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of wh ch any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax." *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 237. FEES OF COUNTY TREASURER.—The treasurer of each county in which the office of appraiser is not salaried shall be allowed to retain on all taxes paid and accounted for by him each year under this article, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers. *(Thus amended by L. 1898, chap. 289, and L. 1901, chap. 173, taking effect April 1, 1901.)*

§ 238. BOOKS AND FORMS TO BE FURNISHED BY THE STATE COMPTROLLER.—The comptroller of the state shall furnish to each surrogate, a book, which shall be a public record, and in which he shall enter the name of every decedent upon whose estate an application to him has been made for the issue of letters of administration, or letters testamentary, or ancillary letters, the date and place of death of such decedent, the estimated value of his real and personal property, the names, places, residence and relationship to him of his heirs-at-law, the names and places of residence of the legatees and devisees in any will of any such decedent, the amount of each legacy and the estimated value of any real property devised therein, and to whom devised. These entries shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The surrogate shall also enter in such book the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by any appraiser appointed by him under this article,

and the value of annuities, life estates, terms of years, and other property of any such decedent or given by him in his will or otherwise, as fixed by the surrogate, and the tax assesed thereon, and the amounts of any receipts for payment or any tax on the estate of such decedent under this article filed with him. The state comptroller shall also furnish to each surrogate forms for the reports to be made by such surrogate, which shall correspond with the entries to be made in such book.

§ 239. REPORTS OF SURROGATE AND COUNTY CLERK.—Each surrogate shall, on January, April, July and October first of each year, make a report in duplicate, upon the forms furnished by the comptroller containing all the data and matters required to be entered in such book, one of which shall be immediately delivered to the county treasurer and the other transmitted to the state comptroller. The county clerk of each county, except in the counties where the registers perform the duties of the county clerk with respect to the recording of deeds, and when in such counties the registers, shall, at the same times, make reports in duplicate, containing a statement of any deed or other conveyance filed or recorded in his office, of any property, which appears to have been made or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred, one of which duplicates shall be immediately delivered to the county treasurer or comptroller and the other transmitted to the state comptroller. In a county in which the office of appraiser is salaried but one copy of each such report need be made, which shall be transmitted to tne state comptroller as herein required. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.*)*

§ 240. REPORTS OF COUNTY TREASURER.—Each county treasurer in a county in which the office of appraiser is not salaried shall make a report, under oath, to the state comptroller, on January, April, July and October first of each year, of all taxes received by him under this article, stating for

what estate and by whom and when paid. The form of such report may be prescribed by the state comptroller. He shall, at the same time, pay the state treasurer all taxes received by him under this article and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within thirty days from the times herein required, he shall pay interest at the rate of ten per centum per annum. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.*)*

§ 240a. REPORT OF STATE COMPTROLLER; PAYMENT OF TAXES.—The state comptroller shall deposit all taxes collected by him under this article in a responsible bank, banking house or trust company in the city of Albany, as, in the opinion of the comptroller are secure, and pay the highest rate of interest to the state for such deposits, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in this office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking-house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have endorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all taxes received by him under this article, stating for what estate, and by whom and when paid; and shall credit himself with all expenditures made since his last previous return on account of such taxes, for salary, refunds, or other purpose lawfully chargeable thereto. He shall at the same time pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous months, as appears from such returns. *(Inserted by L. 1901, chap. 173, taking effect April 1, 1901.)*

§ 241. APPLICATION OF TAXES.—All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state govern-

ment and to such other purposes as the legislature shall by law direct. *(Thus amended by L.* 1901, *chap.* 173, *taking effect April* 1, 1901.)

§ 242. DEFINITIONS.—The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein, whether situated within or without this state. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer," "comptroller," and "district attorney," as used in this article, shall be taken to mean the treasurer, state comptroller or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-nine of this article. *(Thus amended by L.* 1898, *chap.* 88, *and L.* 1901, *chap.* 173, *taking effect April* 1, 1901*).*

§ 243. EXEMPTIONS IN ARTICLE ONE NOT APPLICABLE.—The exemptions enumerated in section four of the tax law, of which this article is a part, shall not be construed as being applicable in any manner to the provisions of article ten hereof. (*Added by L.* 1900, *chap.* 382, *taking effect April* 11, 1900.)

L. 1901, chap. 173, § 17. REPEAL.—Chapter eight hundred and sixty-one of the laws of eighteen hundred and ninety-five; chapters nine hundred and fifty-two and nine hundred and fifty-three of the laws of eighteen hundred and ninety-six, chapter three hundred and seventy-five of the laws of eighteen hundred and ninety-seven, and chapters two hundred and sixty-nine, two hundred and seventy and four hundred and six of the laws of eighteen hundred and ninety-nine, and chapter three hundred and seventy-nine of the laws of nineteen hundred, are hereby repealed.

L. 1901, chap. 173, § 18. TAKING EFFECT.—This act shall take effect April first, nineteen hundred and one, except that salaried appraisers for the counties of Albany, Suffolk, Westchester, Dutchess, Monroe, Oneida, Onondaga, Orange and Rensselaer shall not be appointed before January first, nineteen hundred and two, and until such time such counties shall be deemed counties in which the office of appraiser is not salaried under the provisions of this act. (*Thus amended by L. 1901, chap. 288, taking effect April 5, 1901.*)

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# APPENDIX.

## CHARTER OF UNITED STATES TRUST COMPANY OF NEW YORK.

CHAPTER 204 OF THE LAWS OF 1853, AS AMENDED BY CHAPTER 60 OF THE LAWS OF 1863, CHAPTER 309 OF THE LAWS OF 1874, CHAPTER 433 OF THE LAWS OF 1892, AND SECTION 163 OF THE BANKING LAW (CHAPTER 689 OF THE LAWS OF 1892).

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

§ 1. From the time this act shall commence and take effect, Elisha Riggs, Peter Cooper, Watts Sherman, Luther Bradish, John J. Phelps, Jacob A. Westervelt, Erastus Corning, Shepherd Knapp, Robert Kelly, Elbridge G. Spaulding, Frederick Sheldon, Greene C. Bronson, Wilson G. Hunt, David Hadden, Royal Phelps, Stephen Cambreleng, George T. Adee, John J. Cisco, Edward H. Gillilan, Joseph Walker, Rufus Keeler, Charles E. Bill, Edmund Coffin, James Suydam, Joshua J. Henry, William Tucker, Daniel S. Miller, Gerard Stuyvesant, Thomas Slocumb, Jacob Harsen, James S. Seymour, James Marsh, William C. Wetmore, Benjamin F. Wheelwright, John C. Beach, Caleb O. Halsted, Charles M. Connolly, Benjamin R. Winthrop, Edgar S. Van Winkle, William W. Livermore, Dan H. Arnold, Edward Dewitt, and all such persons as shall hereafter become stockholders in the Company hereby incorporated, shall be a body politic and corporate by the name of the "United States Trust Company of New York."

§ 2. In addition to the general powers and privileges of a corporation, as the same are declared in the third title, of the

eighteenth chapter, of the first part of the Revised Statutes, the corporation hereby created shall have power:

1. To receive moneys in trust and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on, not exceeding in either case the legal rate.

2. To accept and execute all such trusts of every description as may be committed to them by any person or corporation whatsoever, or may be transferred to them by order of the supreme court, or by a surrogate, or by any of the courts of record.

3. To take and accept by grant, assignment, transfer, devise or bequest, and hold any real or personal estate on trusts created in accordance with the laws of this state or of the United States, and execute such legal trusts in regard to the same as may be declared, established or agreed upon in regard thereto.

4. To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and accept and execute any other municipal or corporate trust not inconsistent with the laws of this state.

5. To act as the fiscal or transfer agent for the purpose of receiving and disbursing money, and issuing, registering, transferring and countersigning the certificates of stock, bonds or other evidences of debt of any corporation, association, municipality, state or public authority, on such terms as may be agreed upon.

6. To purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities; and when moneys, or securities for moneys, are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but nothing herein contained shall be construed as giving the right to issue bills to circulate as money.

7. To be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed of the estate of any deceased person, and to be appointed and to act as the committee of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards.

Whenever application shall be made to any court of this

state, or to a surrogate of any county of this state, for letters testamentary on any last will and testament, by the terms of which said company is appointed executor thereof, the said court or surrogate shall grant letters testamentary thereon to said company. Whenever application shall be made to any court of this state, or to a surrogate of any county, for letters of administration upon the estate of any deceased person, with or without the will annexed, and it shall appear that there are no next of kin of the deceased willing, properly qualified and able to accept such administration, such court, or surrogate may, at the request of any party interested in the estate, whether as creditor or beneficiary, grant letters of administration on said estate to said company.

§ 3. In all cases where an application shall be made to any court of this state, or to a surrogate having jurisdiction, for the appointment of a guardian to any infant, the annual income of whose estate shall exceed the sum of one hundred dollars, the said court or surrogate shall have power to appoint the said company as guardian of the estate of such infant; and every court into which moneys may be paid by parties, or be brought by order or judgment, may, by order, direct the same to be deposited with the said company.

§ 4. On any sum of money not less than one hundred dollars, which shall be collected or received by the said company in its capacity of guardian, receiver or depository of moneys in court, an interest shall be allowed by the said company of not less than the rate of three per cent. annually, which interest shall continue until the moneys so received shall be duly expended or distributed.

§ 5. Where the annual income of an infant, of whose estate the said company shall be a guardian, shall exceed the sum allowed, or which may be sufficient for the education and support of such infant, such surplus income shall be accumulated by the said company for the benefit of such infant, by adding interest on the whole as a new principal; and the interest so to be allowed and added in such accumulation, shall in no case be less than three per cent.

§ 6. No bond nor other collateral security shall be required from the said company for or in respect of any trust nor when appointed guardian, receiver, depositary, executor or administrator, with or without the will annexed, but all investments of money received by the said company in either of such characters shall be at the sole risk of the said corporation, and for all losses of such moneys, the capital stock, property and effects of the said corporation shall be absolutely liable, and in case of the dissolution of said company by the legislature the supreme court, or otherwise, the debts due from the company as guardian, receiver or depositary of moneys in court, or as executor or administrator, with or without the will annexed, hall have a preference.

§ 7. The capital of the said company shall be one million of dollars, which shall be divided into shares of one hundred dollars each. The capital shall be invested in bonds and mortgages, on unincumbered real estate, within the State of New York, worth double the amount loaned thereon, or in stocks of the United States, or of this state, or in stocks or bonds of the incorporated cities of this state, authorized to be issued by the Legislature; and within two years after the said company commences business, at least one-half of the capital shall be invested, and thereafter remain constantly invested, in bonds and mortgages on real estate without the limits of the city and county of New York.

§ 8. After the sum of five hundred thousand dollars shall have been paid in and invested, and before the said corporation shall commence business, the trustees shall assign and tranfer, to the superintendent of the banking department, bonds and mortgages on unincumbered real estate, within the State of New York, worth double the amount secured thereby; or shall transfer and assign to the said superintendent public stocks of the United States, or of the State of New York, or of any incorporated city of this state, to the amount of one hundred thousand dollars, which bonds and mortgages, or stocks, shall be held by the said superintendent of the banking department, in trust as security for the depositors and creditors of said corporation, and subject to the sale and disposal of the said superintendent of the banking department, upon the order of the supreme court, as

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hereinafter provided. Upon the assignment of the said bonds and mortgages, and stock the said superintendent of the banking department shall issue to the said corporation a certificate of such fact, upon the receipt of which the said corporation may commence business; and an equal amount in value, to be determined by said superintendent, of such stock, and bonds and mortgages shall at all times, during the corporate existence of said company, remain in the possession of said superintendent of said banking department. Until otherwise ordered by the supreme court the superintendent of the banking department shall pay over to the said company the interest which shall be received on the securities assigned to him by the said company, or he may authorize the said company to collect the same for its own benefit.

§ 9. All the corporate powers of the said company shall be exercised by a board of trustees, and such officers and agents as they shall appoint. The board of trustees shall consist of not fewer than thirteen nor more than thirty persons, two-thirds of whom at least must be citizens of this state and stockholders to the amount of ten shares each, at least; and the first board of trustees shall consist of the first thirty persons whose names are mentioned in the first section of this act, who shall possess the necessary qualifications as above declared. They shall elect a president annually from their own body, and shall have power to declare, by a by-law, what number of trustees shall be a quorum for the transaction of business.

§ 10. The board of trustees shall divide itself, by lot, into three classes of ten each. The term of office of the first class shall expire at the end of one year; that of the second class at the end of two years; and that of the third class at the end of three years; and at the expiration of the first year, and annually thereafter, ten trustees shall be chosen, who shall hold their office for three years, or until their successors are elected. Trustees shall be re-eligible, and vacancies occurring in the intervals of elections shall be filled by the board.

§ 11. The election for trustees shall be held annually at the office of the company, and the board shall give at least

ten days' notice thereof, in two daily newspapers published in the city of New York. In case of a failure to elect on that day, the trustees whose regular terms do not expire, shall proceed to elect ten trustees, (or such number as may have failed of election), who shall, with them, constitute the board. Before any member shall enter upon the duties of a trustee, his election shall be approved by the supreme court, and in case of disapproval by said court, the board of trustees shall fill the vacancy thereby created, subject to approval as before.

§ 12. Every election for trustees shall be by "ballot," and a plurality of votes shall elect; three inspectors for the next succeeding election shall be elected at the same time and in the same manner.

§ 13. Every shareholder shall be entitled to one vote for trustees for every share of capital stock standing in his name on the books of the company.

§ 14. Within six months after this act shall be in force, the corporators named in the first section shall appoint a committee of not less than three, nor more than five, of their own number, whose duty it shall be to open books for subscription to the capital stock, and who shall give at least ten days' notice, in two daily newspapers in the city of New York, of the time and place at which said books will be opened.

§ 15. Every subscriber shall, at the time of subscription, pay to the committee receiving the same the sum of ten dollars on each share by him subscribed; and after the shares shall have been distributed and allotted, each stockholder shall pay the whole amount remaining due on the shares so held by him within twelve months thereafter, at such place and at such time or times as the trustees shall appoint, of which at least ten days' public notice shall be given; the shares of each stockholder omitting to make such payment shall be forfeited, together with all previous payments made thereon.

§ 16. No loan shall be made directly or indirectly to any trustee.

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§ 17. The certificates of stock and of moneys received in trust, issued by the said corporation, shall be assignable on the books of the company, according to such regulations as the board of trustees shall establish, but no alteration or change shall be made, in the regulations so established, unless by an order of the supreme court, made on a petition of a majority of the trustees.

§ 18. The trustees shall have a discretionary power of investing the moneys received by them, in trust, in public stocks of the United States or of any individual state, or in the bonds or stocks of any incorporated city in this state, or in such real or personal securities as they may deem proper; but the said company shall not hold stock in any private incorporated company beyond twenty-five thousand dollars.

§ 19. The amount of money which the said company shall have in trust, in deposit, or loan at any time, shall not exceed ten times the amount of its capital and surplus, nor shall its outstanding loans at any time exceed said amounts, but the said company may at any time receive in deposit and loan out any money which may be deposited with it by any of the courts of this State, including the surrogates' courts, notwithstanding such limitation.

§ 20. The board of trustees shall exhibit annually to the supreme court, on such day as said court shall appoint, a full statement of their affairs, in such form and verified in such manner as the said court shall direct. The court, should it be deemed proper, may refer such statement to a referee, with directions to make a full and thorough investigation into the affairs and management of the company, and to report his opinion in relation to the ability and integrity with which its affairs are conducted, the prudence and safety of its investments, the security afforded to those by whom its engagements are held, and the advantage derived by the public from its operations. The expenses of every investigation so made shall be defrayed by the company in such sum as the said court shall certify to be reasonable and just.

§ 21. Upon the exhibition of any such annual statement, or upon the coming in of a referee's report thereon, the court

may recommend to the trustees such alterations and amendments in the regulations and by-laws of the company as shall by the court be deemed to be required for the public good and a just regard to the security of the creditors. If any recommendation, so made by said court, shall be neglected, or without just cause, disregarded by the trustees, the court shall make a full communication of the facts to the Legislature at the first session thereafter.

§ 22. A copy of every statement so made, and of every report of a referee thereon, shall be transmitted to the comptroller by the president of the company within thirty days after it shall have been made or received.

§ 23. Whenever it shall appear to the satisfaction of the supreme court, that any officer, trustee or servant of said corporation has been guilty of any fraud or misconduct, the said court may, upon proper notice to such person, and affording him an opportunity of being heard in his defence, remove such person or persons, and make such further order and take such further measures for securing the funds and properties of the said corporation as the said court shall deem expedient, and may make such further order as the condition and circumstances of the said corporation shall require by the appointing of a receiver of the said corporation, or otherwise causing the same to go into liquidation, and by ordering the said stocks and bonds and mortgages, assigned and deposited with the superintendent of the banking department, to be sold, collected or enforced for the benefit of the depositors or creditors of said corporation.

§ 24. Whenever default shall be made in the payment of any debt or liability contracted by this corporation, the stockholders thereof shall be individually responsible, equally and ratably for the amount of such debt or liability, with interest, to the extent of their respective shares of stock in said corporation.

§ 25. For all losses of money which the capital stock shall not be sufficient to satisfy, the trustees shall be responsible, in the same manner and to the same extent that trustees are now responsible in law or equity.

§ 26. The books of the said corporation shall, at all times during their hours for business, be open for inspection and examination by the comptroller of this state, and such other person as the Legislature or comptroller may designate as their agent for such purpose.

§ 27. This Act shall not be construed to confer on the said company any right or power to make any contract, or to accept or execute any trust whatever, which it would not be lawful for any individual, under the general rules of law which are or shall be in force, to make, accept or execute; and the Legislature shall have power at any time hereafter to repeal, alter or modify this act, or any of its provisions.

§ 28. This Act shall take effect immediately.

Banking Law (Chapter 689 of the Laws of 1892):

§ 163. "Every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company."

The powers and obligations of trust companies formed under this general act are set forth in Article IV of the Banking Law, and do not differ materially from those specified in the foregoing charter.

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EVENING POST JOB PRINTING HOUSE, NEW YORK.

No. 423.

Office Supreme Court U.S.
FILED
NOV 15 1902
JAMES H. MCKENNEY,
Clerk.

Brf. of Offenbacher for D. Cs. (mo.

Filed Nov. 15, 1902.

Supreme Court of the United States.

ISABELLA F. BLACKSTONE, individually and as Executrix of the Last Will and Testament of Timothy B. Blackstone, deceased,
Plaintiff in Error,

AGAINST

NATHAN L. MILLER, Comptroller of the State of New York, and EDWARD M. GROUT, Comptroller of the City of York,
Defendants in Error.

October Term, 1902.
No. 423.

## BRIEF IN SUPPORT OF MOTION OF DEFENDANTS IN ERROR.

This is a motion by defendants in error to compel the plaintiff in error to file a bond or other security in a sum sufficient adequately to secure, pending this appeal, the amount involved in this proceeding, or else to suffer the cancellation of the approval of the bond already filed herein. The facts are fully stated in the moving affidavit. An application similar to the present one was originally made to Mr.

Justice Peckham, the Justice who approved said bond, and without having been passed upon by him, it has by his direction been brought before the Court *in banc*.

Plaintiff in error is appealing by writ of error under U. S. Rev. Stat., Sect. 709, from an order of the *Court of Appeals of the State of New York*, affirming orders of lower courts of that State fixing the tax upon the transfer of such of the property of the above named decedent as at the time of his death was situated within said State, at the sum of $77,536. Adding penalty already accrued, the amount affected by the order appealed from already exceeds $96,500. The bond is for the nominal sum of $1,000, barely sufficient to secure the costs of this appeal; but because in form it purports to secure all "*damages and costs*," it effectually stays proceedings to collect over $96,500, not otherwise secured, and which may easily be lost to the State of New York unless secured pending this appeal.

If counsel for plaintiff in error claims here, as he did before Mr. Justice Peckham on information and belief, that there is property of this estate somewhere within the State of New York, it is plain that unless that State is either properly secured or permitted at once to proceed under the order of the Court of Appeals to discover and impound sufficient property to satisfy the tax and penalty, it may be absolutely deprived of such tax by the removal or concealment of such property pending this appeal.

The bond in question, by virtue of its form and the approval of a Justice of this Court, acts as a *supersedeas* under the U. S. Rev. Stat., Section 1000, and Supreme Court Rule No. 29. The approval of so inadequate a bond was undoubtedly inadvertent. The application therefor being *ex parte*, the aforesaid facts were evidently not brought to the attention of the learned Justice approving the same. It is clear that an *ex parte* approval based on an imperfect knowledge of the facts is subject to

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withdrawal or modification by the Justice in question, or, with his consent, as in the case at bar, by the Supreme Court.

The motion of defendants in error is meritorious and of the greatest importance for the State of New York. It is respectfully submitted that it should be granted.

Dated at Washington, November 17, 1902.

JULIUS OFFENBACH,
Of Counsel for Defendants in Error.